EXHIBIT A

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR BOARD OF CONTROL DECISION ON:

Statutes 1980, Chapter 1143
Claim No. 3929

Directed by Statutes 2004, Chapter 227, Sections 109-110 (Sen. Bill No. 1102)

Effective August 16, 2004

Case No. 04-RL-3929-05

Regional Housing Needs Determination-Councils of Governments

REQUEST FOR RECONSIDERATION OF STATEMENT OF DECISION

California Code of Regulations, Title 2, Division 2, Chapter 2.5, Article 7, Sec. 1188.4

HEARING DATE: March 30, 2005

I. INTRODUCTION

On March 30, 2005, the Commission on State Mandates held a hearing on its reconsideration of a test claim filed by the Association of Bay Area Governments in this case for reimbursement of costs associated with performing the Regional Housing Needs Analysis ("RHNA"). The Commission on State Mandates ("Commission") summarily denied the claim finding that (1) COGs are not eligible claimants under Article XIII B, Section 6 ("SB 90") and Government Code Section 17500 et seq., and (2) because COGs possess fee authority pursuant to Government Code Section 65584.1, they cannot be reimbursed for their activities in developing the RHNA.

The Southern California Association of Governments ("SCAG") hereby requests that the Commission reconsider its Statement of Decision ("Decision"), which it posted on its website on April 5, 2005, pursuant to California Code of Regulations, Title 2, Section 1188.4. A copy of the Decision is attached hereto as Exhibit A. SCAG requests reconsideration on the grounds that the Commission's Decision is contrary to law, and the Commission failed to adequately consider the arguments made by SCAG and other Councils of Governments ("COGs") during the prior proceeding.

II. BACKGROUND

SCAG is the largest of nearly 700 councils of government in the United States. It is a Joint Powers Agency established pursuant to California Government Code Section 6500 *et seq.* As the federally-designated Metropolitan Planning Organization ("MPO") for Southern California pursuant to 23 U.S.C. 134(a) and (g) and 49 U.S.C. § 5303(f), SCAG is mandated by federal law to research and prepare plans for transportation, growth management, hazardous waste management, and air quality for the counties of Los Angeles, Orange, San Bernardino, Riverside, Ventura, and Imperial. This region encompasses more than 38,000 square miles and a population exceeding 15 million persons.

Under state law, California must conduct a state and regional housing needs assessment which determines projected housing construction needs for the region based on population projections produced by the State Department of Finance and the

regional population forecasts developed by SCAG and used in preparing Regional Transportation Plans. Govt. Code § 65584.

Pursuant to California Government Code Section 65584, SCAG must allocate shares of the regional housing need to cities and counties within the region, and allocate shares of subregional housing need to subregional agencies that choose to accept the delegation of responsibility from SCAG. See Govt. Code § 65584.

SCAG has submitted substantial claims for reimbursement for its RHNA duties since the mandate began in 1983, and it has been reimbursed pursuant to SB 90. Since then, the Legislature has made changes to the RHNA process, but the underlying state mandate for SCAG to perform the RHNA has remained the same.

On August 16, 2004, the Governor signed into law SB 1102, a general government omnibus trailer bill which, among other things, enacted Section 65584.1 of the Government Code which authorizes COGs to "charge a fee to local governments to cover the projected reasonable, actual costs of the council in distributing regional housing needs pursuant to this article." Govt. Code § 65584.1. According to the Legislature, "[t]his section is declaratory of existing law." Id.

In denying ABAG's claim for reimbursement for its RHNA costs, the Commission first found that COGs are somehow no longer local agencies as defined by Government Code Section 17518 which defines "local agency" to mean "any city, county, special district, authority, or other political subdivision of the state." Even assuming that COGs are local agencies, the Commission found that RHNA costs are not "costs mandated by the

state." The Commission cites to Section 65584.1 to demonstrate that the COGs have "the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Decision at 17-18 (citing Govt. Code § 17556). As will be discussed in more detail below, because neither finding is supported by law, SCAG hereby requests that the Commission reconsider these findings.

III. ARGUMENT

A. The Commission Erred in Finding that COGs are not Eligible Claimants Under Article XIII B, Section 6 and Government Code Section 17500 et seq.

Government Code Section 17518 states: "'[l]ocal agency' means any city, county, special district, authority, or other political subdivision of the state." The Commission found that "[a]lthough the Legislature includes the word 'authority' in the definition of local agency, it is not clear from the plain language of the statute what type of authority the Legislature intended to include within the definition." Decision at 15. The Commission then concluded that because

> "the Legislature placed the word 'authority' next to the words, 'city, county, and special district' when defining eligible claimants for the purposes of reimbursement under [SB 90] . . . it is presumed that Legislature intended that an 'authority' would be of the same general nature or class as a city, county or special district. Cities, counties, and special districts have the power to tax and are subject to the

spending limitations in article XIII B, section 6. Joint powers authorities, such as COGs, do not have the power to tax and are not subject to the spending limitations in article XIII B. Thus joint powers authorities are not in the same class as a city, county, or special district for purposes of reimbursement under [SB 90]."

Decision at 16.

The Commission takes an enormous leap here. The fact that cites, counties and special districts have the power to tax, does not mean the "authorities" must also have this same power. A less strained and more reasonable interpretation is that the Legislature intended to include all forms of cities, counties, and special districts including "authorities" and "political subdivisions" in its definition of "local agencies." This interpretation is supported by the plain language of the statute: "'[l]ocal agency' means any city, county, special district, authority, or other political subdivision of the state." There are no specified characteristics or criteria listed or implied which give rise to an interpretation that each type of entity listed must have the power to tax in common.

The Commission's focus on the definition of "special districts" is completely misplaced since the COGs have not claimed that they qualify as special districts for reimbursement under SB 90. Rather, the COGs, as joint power authorities consisting of cities and counties, qualify for reimbursement as

"local agencies" as defined by Section 17518, which includes joint powers "authorities."

B. The Commission Erred in Finding that Section 65584.1 Precludes COGs from Being Reimbursed Under SB 90

1. The COGs are Governed by Their JPA Agreements Which do not Allow the COGs to Charge the Fees Set Forth in Section 65584.1

COGs are Joint Powers Agencies ("JPAs") established pursuant to the Joint Exercise of Powers Act (Cal. Govt. Code § 6500 *et seq.*) and are formed when the member agencies enter into joint powers agreements ("JPA Agreements"). The JPA Agreements, as agreed to by all the members, set forth the scope of the COGs' powers. The Legislature cannot, simply by enacting new legislation, authorize the COGs to levy fees against their members. Any fee to be charged must be authorized by the COGs' respective JPA Agreements, and therefore, must be approved by each of the member agencies. However, none of the COGs' JPA Agreements allow the COGs to charge any fee. See Rebuttal Brief of Southern California Association of Governments, Sacramento Area Council of Governments, Association of Bay Area Governments, California Association of Councils of Governments, and San Diego Association of Governments at 4-5.

Nevertheless, Section 65584.1 purports to grant the COGs authority to charge their members fees to perform the RHNA:

> "Councils of government may charge a fee to local governments to cover the projected reasonable, actual costs of the council in distributing regional housing needs pursuant to this article . . . ."

Govt. Code § 65584.1. Such authority is not set forth in the JPA Agreements, and because the COGs are governed solely by these agreements, the Legislature cannot unilaterally require the COGs to exercise this authority. See Govt. Code § 6503 (requiring JPA agreements to set forth purpose, method, and power to be exercised by the JPA).

In fact, by purporting to grant the COGs authority in excess of the JPAs, the Legislature is in violation of the Contract Clause of the state Constitution, which states that a "law impairing the obligation of contracts may not be passed." Cal. Const. Art. 1, § 9. As discussed by the League of Cities, the Legislature may not interfere with the terms of the JPA Agreements by forcing the COGs to exercise authority that contradicts the terms of the agreements.

Note that even if the COGs' member agencies approved the COGs authority to charge the "fee" pursuant to Section 65584.1, this fee would not be a fee for service; rather, it would simply be a voluntary agreement by the member agencies to pay for the cost of the regional housing needs assessment with local proceeds of taxes. Thus, 65584.1 places the burden of paying for the RHNA, a state mandated program, directly on the COGs themselves by imposing the costs on their members. This is specifically the type of burden on local tax revenue that SB 90 sought to prevent.[1] See San Diego Unified School District v. Commission on

[1] The RHNA program is a state program that was created to address the affordable housing shortage in California. The COGs administer the regional portions of the program under the oversight and ultimate responsibility of HCD. See Govt. Code § 65584(a) ("The appropriate council of governments shall determine the share for each city or county consistent with the criteria of this subdivision and with the advice of [HCD]. . . .") However, the State

State Mandates, 33 Cal.4th 859, 875 (2004) (SB 90 "was intended to preclude the state from shifting to local agencies the financial responsibility for providing public services in view of restrictions on the taxing and spending power of the local entities.") (quoting County of Los Angeles v. State of California, 43 Cal.3d 46, 56-57 (1987)); see also Redevelopment Agency of the City of San Marcos v. California Commission on State Mandates, 55 Cal.App.4th 976, 985 (1997) ("A central purpose of section 6 is to prevent the state's transfer of the cost of government from itself to the local level.").

In response to SCAG arguments, the Commission simply states that "COGs, as joint powers authorities, are legally separate entities from parties to the agreement. Each entity has separate funds, which are accounted for separately. Thus, the Commission disagrees that COGs are collecting from themselves by collecting fees from member agencies." Decision at 21. The Commission misses the point.

SCAG recognizes that it is a separate legal entity from its members, however, unlike entities like redevelopment agencies, SCAG does not receive revenue from tax increments which are not subject to the expenditure limitations set forth in Article XII B. Rather, SCAG receives funds through membership dues paid by

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(via HCD) is ultimately responsible for determining the regional share of the statewide housing need. See id. ("[HCD] shall determine the regional share of the statewide housing need . . . .")

Notably, for areas without COGs, HCD determines the cities' and counties' share of housing need. See Cal. Govt. Code § 65584(b). There is no requirement for these cities and counties to perform the RHNA, though they may agree to accept the responsibility. See id. Thus, it is in the State's interest, not the local agency, to complete the RHNA. This clearly demonstrates that Section 65584.1 thrusts the costs of state services onto local agencies, contrary to SB 90.

their member agencies, all of which are cities and counties. These dues are generally paid with general tax revenues. If SCAG is required to pay for the costs incurred during the RHNA process, it would be required to turn to its members for additional fees, i.e., more general tax revenues from their member agencies. These revenues are the very local agency revenues that SB 90 was intended to protect, and by collecting such fees, SCAG is effectively collecting fees from itself.

2. The Commission's Reliance on *Connell* is Misplaced

The purported authority to levy fees against developers does not provide cities and counties with the ability to recover costs in the same manner as the fee authority at issue in Connell v. Superior Court, 59 Cal.App.4th 382 (1997). The "fee" authorized by Section 65584.1 is entirely different than the legitimate passing through of costs to end users, as upheld in Connell. In Connell, the State Department of Health Services increased the level of purity required before reclaimed water could be used for certain irrigation purposes. Several water districts in Southern California asserted that the requirement resulted in a reimbursable state mandate, because the districts would be required to upgrade their reclamation facilities in order to meet the new purity standards. The Court determined that, because the water districts had explicit authority to increase fees to the end users of the reclaimed water, the water districts were not entitled to a reimbursement, based on the exception set forth in

Revenue and Taxation Code section 2253.2 (now Government Code section 17556).

The water agencies were able to charge a fee to end users for a specific service. In the present case, however, cities and counties are expected to pass costs through to developers who are building homes in those cities and counties. These developers do not receive any specific service from the cities and counties. Moreover, the ability of cities and counties to recover their costs is entirely dependent on the extent to which developers are operating in any given community. Cities and counties will likely be unable to accurately predict the extent of development activity in their community over a given period of time. As a result, cities and counties are nearly certain to either (1) underestimate the fees necessary to pay the cost of the RHNA, and thereby be obligated to use local tax revenues to pay at least a portion of the cost of the RHNA, or (2) charge developers too much for the cost of conducting the RHNA, and thereby violate the requirement that the fees under 65104 not exceed the cost of service. Because Section 65584.1 does not provide adequate authority to levy fees to offset the cost of conducting the RHNA, the costs are not exempted from reimbursement pursuant to Government Code Section 17556(d).

SCAG advanced these argument distinguishing Connell in its Rebuttal Brief, however, the Commission failed to address the arguments. Rather, the Commission simply concludes:

"The Commission finds the reasoning of the Connell case applies to this test claim reconsideration.

> Section 65584.1's fee authority provision grants authority to COGs for the 'council's actual cost in distributing regional housing needs.' The only limitation on the COG fee is that it 'not exceed the estimated amount required to implement its obligations pursuant to Section 65584.'
>
> In view of Connell, the Commission does not find convincing the various arguments regarding the sufficiency or the difficulty of the basis of the fee. These arguments are not relevant to the legal inquiry because the sole consideration is whether COGs have fee authority."

Decision at 24. SCAG respectfully requests that the Commission reconsider its Decision in light of the arguments advanced by SCAG here and in its prior submittals to the Commission.

IV. CONCLUSION

COGs are local agencies governed solely by their JPA agreements which do not provide the COGs with authority to charge its members fees for performing the RHNA. The Legislature cannot force the COGs to exercise authority that they simply do not possess. Nor can the Legislature authorize the COGs members to pass on the costs to developers since these costs were not incurred by the members themselves, but rather, the COGs. The RHNA was created to address the affordable housing shortage in the State and the ultimate responsibility for the RHNA lies with the State.

It is indisputable that state funds have been appropriated and paid to COGs for the RHNA program since 1983, and there is no reason to deviate from this practice. None of the State's and the COGs' obligations have changed; the only difference is the enactment of Section 65584.1. As discussed in the COGs' earlier submittals, in spite of the provisions of Section 65584.1, the COGs do not have the authority to impose the RHNA fees on its members without approval from its members, nor do the members have the authority to impose the fees on developers. Therefore, the Commission should reconsider its Decision to deny ABAG's test claim and affirm its prior finding that the costs incurred by COGs in the RHNA process are reimbursable mandated costs.

Dated: May 5, 2005

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STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

COMMISSION ON STATE MANDATES

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April 5, 2005

TO: Interested Persons

RE: **Adopted Statement of Decision**
Regional Housing Needs Determination: Council of Governments, 04-RL-3929-05
Directed by Statutes 2004, Chapter 227, Sections 109-110 (Sen. Bill No. 1102)

On March 30, 2005, the Commission on State Mandates adopted the attached Statement of Decision denying Board of Control Claim Number 3929. This decision will be reported to the Legislature.

Please contact Eric Feller at (916) 323-8221 if you have any questions.

Sincerely,

PAULA HIGASHI
Executive Director

Enclosure: Adopted Statement of Decision

EXHIBIT A

BEFORE THE

COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR BOARD OF CONTROL DECISION ON: Statutes 1980, Chapter 1143 Claim No. 3929. Directed by Statutes 2004, Chapter 227, Sections 109-110 (Sen. Bill No. 1102), Effective August 16, 2004.	No. 04-RL-3929-05 *Regional Housing Needs Determination: Councils of Governments* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on March 30, 2005)*

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

PAULA HIGASHI, Executive Director

Date

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR BOARD OF CONTROL DECISION ON: Statutes 1980, Chapter 1143 Claim No. 3929. Directed by Statutes 2004, Chapter 227, Sections 109-110 (Sen. Bill No. 1102), Effective August 16, 2004.	No. 04-RL-3929-05 *Regional Housing Needs Determination: Councils of Governments* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on March 30, 2005)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on March 30, 2005. Scott Haggerty and Rose Jacobs Gibson appeared for the Association of Bay Area Governments. Karen Tachiki and Lynn Harris appeared for the Southern California Association of Governments. Rusty Selix appeared on behalf of the California Association of Councils of Governments. Susan Geanacou appeared for the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis at the hearing by a vote of 3-0, with one abstention.

BACKGROUND

Statutes 2004, chapter 227 (Sen. Bill No. 1102, effective Aug. 16, 2004) directs the Commission to reconsider the Board of Control's final decision and parameters and guidelines on the *Regional Housing Needs* program. Sections 109 and 110 of the bill state the following:

> Notwithstanding any other provision of law, the Commission on State Mandates shall reconsider former State Board of Control decisions 3916, 3759, 3760,[1] and 3929 regarding the regional housing needs mandate enacted by Chapter 1143 of the Statutes of 1980 to determine whether the statute is a reimbursable mandate under Section 6 of Article XIII B of the California Constitution in light of federal and state statutes enacted and federal and state court decisions rendered since this statute was enacted, including the existence of fee authority pursuant to Section 65584.1[2] of the Government Code. The

[1] The reconsideration for claims 3916, 3759, and 3760 is in a separate statement of decision entitled *Regional Housing Needs Determination.*

[2] Government Code section 65584.1 (added by Stats. 2004, ch. 227) reads:

commission, if necessary, shall revise its parameters and guidelines to be consistent with this reconsideration.

Any changes by the commission shall be deemed effective July 1, 2004.

The Commission on State Mandates shall amend the appropriate parameters and guidelines, and the Controller shall revise the appropriate reimbursement claiming instructions to be consistent with this act.

Board of Control Decision

In 1981, the Board of Control determined that Statutes 1980, chapter 1143 imposes a reimbursable mandate for claim no. 3929 (filed by the Association of Bay Area Governments, or ABAG). The test claim legislation enacted content requirements for housing elements that cities and counties are required to adopt as part of their general plans.[3] For example, section 65583[4] of the test claim legislation requires the housing element to contain an assessment of housing needs and inventory of resources and constraints relevant to meeting those needs, including detailed content as specified.[5] The housing element is also required to include "A statement of the community's goals, quantified objectives, and policies relative to the maintenance, improvement, and development of housing."[6] A five-year program for implementation is also required, with content outlined in detail.[7]

The test claim statute defines the locality's share of the regional housing need, and requires the Department of Housing and Community Development (HCD) or the applicable council of government (COG) to determine the existing and projected housing needs for its region, and to determine each locality's share of the housing need.[8] After the COG determines the housing needs for each locality in its region, a county or city may revise the definition of its share based on available data. The COG is then required to accept the revision or indicate, based on

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Councils of government may charge a fee to local governments to cover the projected reasonable, actual costs of the council in distributing regional housing needs pursuant to this article. Any fee shall not exceed the estimated amount required to implement its obligations pursuant to Section 65584. A city, county, or city and county may charge a fee, not to exceed the amount charged in the aggregate to the city, county, or city and county by the council of governments, to reimburse it for the cost of the fee charged by the council of government to cover the council's actual costs in distributing regional housing needs. The legislative body of the city, county, or city and county shall impose the fee pursuant to Section 66016, except that if the fee creates revenue in excess of actual costs, those revenues shall be refunded to the payers of the fee.

[3] Government Code section 65350.

[4] All statutory references are to the Government Code unless otherwise indicated.

[5] Government Code section 65583, subdivision (a).

[6] Former Government Code section 65584, subdivision (b). This was later amended to add "preservation."

[7] Former Government Code section 65584, subdivision (c).

[8] Former Government Code section 65584, subdivision (a).

available data and accepted planning methodology, why the revision is inconsistent with the regional housing need.[9]

Although the housing element requirement in the general plan dates to 1967 (Stats. 1967, ch. 1658), the housing element had no detailed content requirements until the Legislature enacted the test claim statute in 1980. Also, HCD had promulgated regulations or guidelines for housing elements,[10] but these were not mandatory for cities, counties or COGs.[11]

The Board of Control adopted parameters and guidelines for the test claim statute in October 1981. As stated in the parameters and guidelines:

> By enacting Chapter 1143, Statutes of 1980, the Legislature required that each council of government (COG) determine the existing and projected need for housing for its region, and determine each City and County share of such need, based upon these factors:
>
> -Market demand for housing
> -Employment opportunities
> -Availability of Suitable [sic] sites and public facilities
> -Commuting patterns
> -Type and tenure of housing
> -Housing needs of farmworkers
> -Desire to avoid impaction of localities with relatively high proportions of lower income households
>
> If a local government revises its share of regional housing needs determined by each COG, the COG shall accept the revision, or shall indicate, based upon available data and accepted planning methodology, why the revision is inconsistent with the regional housing need.

Under the heading "Reimbursable Costs," the parameters and guidelines specify the following activities (omitted paragraphs are those labeled "reimbursable costs"):

1. Activity: If necessary, adjust data provided by [HCD] to determine existing and projected housing needs of the region. Coordination of COG determinations of regional housing needs should take place with [HCD]. [¶]...[¶]
2. Activity: Preparation of draft plan that distributed regional housing needs to cities and counties within the geographical area of the COG, utilizing available data and the factors cited in section 65584 (a). [¶]...[¶]
3. Activity: Conducting of public hearings by the Board of Directors for the purpose of adopting determinations of local shares of regional housing needs. Meetings,

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[9] Former Government Code section 65584, subdivision (c).

[10] The housing element guidelines were repealed in 1982. See California Code of Regulations, title 24, chapter 6, subchapters 3 and 4.

[11] Government Code section 65585, subdivision (a); *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986, 997; *Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875, 885-886.

briefing, training sessions, seminars and advisory committees are not reimbursable. [¶]...[¶]

4. Activity: Review of all local government revisions to the COG's determined shares of regional housing needs, if any, and acceptance of such revisions or indications that such revisions are inconsistent with regional housing needs within 60 days of local government's revisions. [¶]...[¶]

5. [This paragraph specifies costs incurred by specific COGs (e.g., Southern California Association of Governments, or SCAG) within stated deadlines for revisions. The parameters and guidelines also included some express limitations on reimbursement.]

State Agency Position

In comments received November 30, 2004, the Department of Finance (DOF) states that COGs are not eligible claimants under article XIII B, section 6 of the California Constitution because they have no independent power of taxation, nor do the fees they receive from cities and counties constitute "proceeds of taxes" subject to article XIII B appropriation limits. According to DOF, COGs are analogous to redevelopment agencies that were found ineligible for state reimbursement under two cases: *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal. App. 4th 976, and *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266. In those cases, the redevelopment agencies were ineligible for state reimbursement because their financing was not "deemed the receipt by an agency of proceeds of taxes ... within the meaning of Article XIII B of the California Constitution ...." DOF states that COGs are organized pursuant to the Joint Powers Act (Gov. Code, § 6500 et seq.) and have no ability to levy taxes, and therefore, are not eligible claimants. DOF also argues that COGs have fee authority under section 65584.1, so the Commission cannot find there are costs mandated by the state. DOF asserts that funds in past budgets appropriated and paid to COGs for this program "should be considered a voluntary state subvention, not required by mandate law."

No other state agency submitted comments on this reconsideration.

Interested Party Positions

Senator Ducheny: In comments received November 19, 2004, Senator Ducheny states that given budget deficits, it is not realistic to expect ongoing General Fund appropriations for the regional housing needs determinations process. Senator Ducheny also states that *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates, et al.* (1996) 43 Cal. App. 4th 1188, and *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App. 4th 976, make COGs ineligible for reimbursement. She also asserts that the Legislature provided fee authority to COGs in section 65584.1 for the activities in the test claim statute, "and for local governments in turn to pass these costs on to developers as fees." According to the Senator, this fee authority was intended to meet the requirement in section 17556, subdivision (d), concluding that while there is a mandate on COGs "to perform the distribution of the regional housing need," it is not a reimbursable mandate.

California Association of Councils of Governments: CACOG's position is that the original Board of Control decision should remain in effect without change, and the cases cited by Senator Ducheny concern redevelopment agencies and not COGs, so they do not directly decide the

issue. Also, CACOG asserts that redevelopment agencies are created pursuant to specific state laws, whereas COGs are joint powers agencies with no dedicated state revenues and no taxing authority. CACOG argues that the court decisions state that redevelopment agencies are agencies of the state and not a local government, although governed by local officials, and their activities carry out a state function. COGs (except ABAG) also carry out state functions in transportation, with state funding. CACOG argues, "It would be a different issue were the Commission to be considering a responsibility that is imposed upon entities that are Councils of Governments for activities they are carrying out as a transportation planning agency or transportation commission which includes state funding." CACOG argues that there is a difference between activities a city carries out as a redevelopment agency for which it is not eligible for reimbursement, and those it carries out as a city for which it is. As to the COGs' fee authority, CACOG argues that applying it would violate the state and federal constitutional provision against impairment of contracts because the joint powers agreements between COGs and member cities/counties are contracts that contain the only terms for amendment. CACOG reiterates the League of California Cities' (LCC) position that a COG fee on a local government that is not used for a local purpose, but for a statewide purpose, is a tax and is therefore invalid.

Sacramento Area Council of Governments: In its original comments, SACOG urges the Commission to find that the regional housing needs assessments continue to be reimbursable. SACOG concurs with and incorporates CACOG's and LCC's comments. SACOG asserts that section 65584.1 does not grant legitimate fee authority and does not exempt regional housing needs assessments from reimbursement. Because COGs have only the powers enumerated in their fee agreements with member agencies, COGs have no power to levy fees because member agencies would have to amend their joint powers agreements to grant COGs this authority. SACOG's remaining arguments on COG's fee authority are summarized in the analysis below.

In comments on the draft staff analysis submitted in February 2005, SACOG disagrees with the staff recommendation. According to SACOG, the draft staff analysis did not address several of the arguments in favor of reimbursement made by the interested parties, so recommendations in the draft staff analysis should not be followed. SACOG's arguments are further summarized and addressed below.

San Diego Association of Governments: SANDAG supports the comments submitted by CACOG, and states that COGs are eligible claimants. In support, SANDAG cites the Board of Control decision and the State Controller's Mandated Cost Manual.

Southern California Association of Governments: In its comments filed in December 2004, SCAG argues that the state is required to reimburse local governments for the cost of implementing the regional planning mandate. SCAG asserts that whether COGs may actually impose the fee in section 65584.1 is an unresolved issue. According to SCAG, until the issue is resolved it is premature for the Commission to determine section 65584.1's effect on the reimbursability of the regional housing needs assessment process. SCAG also states that the COG's authority to collect fees amounts to COGs collecting from themselves. "Collecting from their [COGs'] members hardly results in any sort of reimbursement to the COGs." So COGs, according to SCAG, would be paying for the assessments themselves. SCAG asserts that this

runs counter to the SB 90[12] policy to prevent the state from shifting costs of providing public services to local agencies.

SCAG states that pursuant to section 65584, it must allocate shares of regional housing need to cities and counties in the region, and allocate shares of subregional housing need to subregional agencies that choose to accept the delegation of responsibility from SCAG. As to whether COGs are eligible claimants, SCAG submits that they are and cites the Board of Control decision and the State Controller's Mandated Cost Manual in support. SCAG asserts that since Revenue and Taxation Code section 2211 has not changed,[13] COGs are still eligible claimants. As to whether the test claim statute imposed a new program, SCAG argues that it did. Before the test claim statute, COGs were not required to determine a regional housing need, nor required to determine local shares of the need. Despite amendments to section 65584 since the test claim statute, it continues to mandate COGs to perform these activities, and is therefore still a new program. As to the new fee authority of section 65584.1, SCAG asserts that its validity is unresolved, and repeats the League of California Cities' assertion that the fee constitutes an unconstitutional local tax. SCAG also argues that such a fee to member agencies would essentially be charging themselves in violation of the principle not to shift costs for public services to local agencies. SCAG states that in light of past reimbursement by the state for this program, the new fee authority should have no bearing on state reimbursement. Finally, SCAG points out that according to the 2003-2004, and 2002-2003 state budget acts, only $1000 has been appropriated for reimbursements to local agencies for the test claim activities.

SCAG (along with ABAG, SACOG, CACOG, and SANDAG) submitted rebuttal comments on January 10, 2005, taking issue with the argument that the fee authority of section 65584.1 precludes COG reimbursement. The fee arguments are summarized below in the analysis.

In commenting on the draft staff analysis, SCAG (in comments submitted jointly with ABAG, SACOG, CACOG and SANDAG) states that the analysis fails to address the COGs' prior comments. SCAG also argues that the plain language of Government Code section 17518 does not support the interpretation that COGs are not eligible claimants under article XIII B, section 6. These arguments are addressed below.

League of California Cities: LCC argues that Statutes 1980, chapter 1183 has not changed and continues to impose a new program or higher level of service on cities and counties, and disagrees with Senator Ducheny that the original parameters and guidelines were in error.

LCC further comments that COGs are eligible claimants because article XIII B, section 6 requires reimbursement to a "local agency," meaning "any city, county, special district, authority, or other political subdivision of the state." (Gov. Code, § 17518). LCC argues that as a "joint powers authority," which is a public entity separate and distinct from the parties that created it, a COG is an "authority" within the meaning of section 17518. LCC disagrees with Senator Ducheny's reference to two cases for the proposition that a COG may not submit a claim for reimbursement. According to LCC, these cases did not hold that a COG may not submit a claim for reimbursement, but only that a redevelopment agency may not submit one. LCC also

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[12] The Commission is currently governed by article XIII B, section 6 of the California Constitution and Government Code section 17500 et seq.

[13] *Ibid.*

makes various arguments against the fee authority of section 65584.1, as summarized below in the analysis.

Finally, LCC notes that developer fees increase the cost of housing, arguing that it is "highly ironic for the state to encourage a city ... or county to impose a fee on a housing developer to pay for the preparation of a housing element which has, as its objective, providing for the local government's fair share of the regional housing need for all income levels."

California State Association of Counties: CSAC, in a December 23, 2004 letter, states that it concurs with the LCC comments.

California Building Industry Association: CBIA, in comments received December 30, 2004, submits that section 65584.1 (fee authority) should not be given weight by the Commission in conducting its review. CBIA asserts that 65584.1 "not serve as a new argument in support of any attempt to foist these state-mandated costs, which are ostensibly for the benefit of State and regional communities as a whole, onto that fraction of the community which may be involved in building and buying new homes." CBIA argues that allowing costs of state-mandated regional planning to promote housing to be passed onto cities and counties, and from there to homebuilders, would further exacerbate the difficulties of providing affordable housing. CBIA states that fees and exactions on residential development help drive up the cost of housing in California, and cited a HCD study that noted problems with residential development fees. CBIA argues that section 65584.1 does not provide authority for COGs to pass on their state-mandated costs to homebuilders or homebuyers by way of city or county fees. According to CBIA, COGs that use section 65584.1 would impair or interfere with their joint powers agreements in violation of article I, section 9 (the contracts clause) of the California Constitution. CBIA also argues that even if a COG implemented this new fee authority, the statute provides no guidance on how it could be lawfully implemented, which would be magnified should cities or counties attempt to pass on costs to developers.

CBIA presents various other arguments against the fee authority of section 65584.1, which are summarized below in the analysis.

Mendocino Council of Governments: In comments received January 20, 2005, MCOG states that it "has no interest in conducting periodic regional housing needs allocation plans for Mendocino County. ... We do it only because it is required by state law. It is a state mandate." [Emphasis in original.] MCOG also concurs with comments submitted by SCAG.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[14] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[15] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[16] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[17]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[18]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[19] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test

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[14] Article XIII B, section 6, subdivision (a), (amended by Proposition 1A in November 2004) provides:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[15] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[16] *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

[17] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[18] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[19] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

claim legislation.[20] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[21]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[22] -

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[23] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[24]

I. What is the scope of the Commission's jurisdiction directed by Senate Bill 1102?

Statutes 2004, chapter 227, sections 109-110 (Sen. Bill No. 1102, eff. Aug. 16, 2004), requires the Commission on State Mandates, "notwithstanding any other provision of law" to "reconsider former State Board of Control decisions 3916, 3759, 3760, and 3929 regarding the regional housing needs mandate enacted by Chapter 1143 of the Statutes of 1980 to determine whether the statute is a reimbursable mandate under Section 6 of Article XIII B of the California Constitution ... ."[25]

Administrative agencies, such as the Commission, are entities of limited jurisdiction that have only the powers that have been conferred on them, expressly or by implication, by statute or constitution.[26] An administrative agency may not substitute its judgment for that of the Legislature. When an administrative agency acts in excess of the powers conferred upon it by statute or constitution, its action is void.[27]

The Commission was created by the Legislature (Gov. Code, §§ 17500 et seq.), and its powers are limited to those authorized by statute. Section 17551 requires the Commission to hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to reimbursement pursuant to article XIII B, section 6 of the California Constitution. Section 17521 (as amended by Stats. 2004, ch. 890) defines a test claim as "the first claim filed

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[20] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[21] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[22] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[23] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[24] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[25] Statutes 2004, chapter 227, section 109.

[26] *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104.

[27] *Ibid.*

with the Commission alleging that a particular statute or executive order imposes costs mandated by the state."

Thus, the Government Code gives the Commission jurisdiction only over those statutes and/or executive orders pled by the claimant in the test claim. The Commission does not have the authority to approve a claim for reimbursement on statutes or executive orders that have not been pled by the claimant. For this reason, this analysis does not apply to amendments to the test claim statutes subsequent to Statutes 1980, chapter 1143.[28]

Furthermore, section 17559 grants the Commission the authority to reconsider prior final decisions only within 30 days after the statement of decision is issued. But in the present case, the Commission's jurisdiction is based solely on Senate Bill No. 1102. Absent Senate Bill No. 1102, the Commission would have no jurisdiction to reconsider any of its decisions relating to housing element provisions of the Government Code since the decisions on those statutes were adopted and issued years ago.

Thus, the Commission must act within the jurisdiction granted by Senate Bill No. 1102, and may not substitute its judgment regarding the scope of its jurisdiction on reconsideration for that of the Legislature.[29] Since a Commission action is void if it exceeds the powers conferred by statute, the Commission must narrowly construe the provisions of Senate Bill No. 1102.

The parameters and guidelines for the *Regional Housing Needs* program were originally adopted in 1981, with a reimbursement period beginning January 1, 1981. Senate Bill 1102 (Stats. 2004, ch. 227) directs the Commission to reconsider Board of Control regional housing test claims. Section 109 of the bill states "[a]ny changes by the commission shall be deemed effective July 1, 2004." Therefore, based on the plain language of Senate Bill 1102 (Stats. 2004, ch. 227, § 109), the Commission finds that the period of reimbursement for the Commission's decision on reconsideration begins July 1, 2004.

II. Are COGs eligible claimants under article XIII B, section 6 of the California Constitution?

Section 65584, as added by Statutes 1980, chapter 1143, requires each COG to determine the existing and projected housing needs for its region, and to determine each locality's share of the housing need.[30] After the COG determines the housing needs for each locality within its region, a county or city may revise the definition of its share based on available data. The COG is then required to accept the revision or indicate, based on available data and accepted planning methodology, why the revision is inconsistent with the regional housing need.[31]

As indicated above, the Board of Control determined in 1981 that section 65584 of the test claim legislation imposed a reimbursable state-mandated program under article XIII B, section 6 on

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[28] Section 65584, the test claim statute that applies to COGs, has been amended by Statutes 1984, chapter 1684, Statutes 1989, chapter 1451, Statutes 1990, chapter 1441, Statutes 1998, chapter 796, Statutes 2001, chapter 159, Statutes 2003, chapter 760, and Statutes 2004, chapter 696. The 2004 statute repealed and replaced section 65584.

[29] *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347.

[30] Former Government Code section 65584, subdivision (a).

[31] Former Government Code section 65584, subdivision (c).

COGs. For purposes of this reconsideration, several COGs urge the Commission to continue to find that they are eligible claimants and are entitled to reimbursement under article XIII B, section 6 for the costs listed in the parameters and guidelines to implement section 65584.[32] SANDAG argues, for example, that the Board of Control's August 1981 decision on this test claim that the test claim statute results in state-mandated costs supports its contention that COGs are eligible claimants. SANDAG also argues that the Mandated Cost Manual issued by the State Controller's Office that lists COGs as eligible claimants support SANDAG's contention as to the eligibility of COGs as claimants.

For the reasons provided below, however, the Commission finds that the Board of Control's decision is legally incorrect under current law. Since 1981, there have been 31 court decisions interpreting article XIII B, section 6. Based on the courts' interpretation of article XIII B, sections 6 and 8, the Commission finds that the "costs" incurred by COGs are not the type of costs that are state reimbursable under the Constitution. Thus, COGs are not eligible claimants for purposes of mandate reimbursement under article XIII B, section 6 and Government Code section 17500 et seq.

The California Supreme Court has repeatedly held that the subvention requirement of article XIII B, section 6 must be interpreted in light of its textual and historical context.[33] Thus, before describing COGs, it is necessary to outline the history and purpose of mandate reimbursement under the California Constitution.

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A imposes a limit on the power of state and local governments to adopt and levy taxes. In 1979, the voters added article XIII B to the Constitution, which "imposes a complementary limit on the rate of growth in government spending."[34] The spending limit in article XIII B is accomplished by limiting the "total annual appropriations subject to limitation" so that "a government entity may not spend more in one year on a program funded with the proceeds of taxes than it did in the prior year."[35] Articles XIII A and XIII B work in tandem, restricting California governments' power both to levy and to spend for public purposes. Their goals are to "protect residents from excessive taxation and government spending."[36]

Article XIII B, section 6 requires, with exceptions not relevant to this issue, that whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse the local government for the costs of the new program or higher level of service. In *County of San Diego v. Commission on State Mandates*,[37] the Supreme Court explained that section 6 represents a recognition that together articles XIII A and XIII B severely restrict the taxing and spending powers of local

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[32] See comments from CACOG, SACOG, SANDAG, and SCAG.

[33] *County of Fresno v. State of California* (1991) 53 Cal.3d 482,487; *County of San Diego, supra,* 15 Cal.4th 68, 81.

[34] *County of San Diego, supra,* 15 Cal.4th at page 81.

[35] *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, 107.

[36] *Ibid.*

[37] *County of San Diego, supra,* 15 Cal. 4th at page 81.

agencies. The purpose of section 6 is to preclude the state from shifting financial responsibility for governmental functions to local agencies, which are ill equipped to undertake increased financial responsibilities *because they are subject to taxing and spending limitations under articles XIII A and XIII B.*[38] [Emphasis added.]

Thus, a local agency must be subject to the tax and spend limitations of articles XIII A and XIII B to be eligible for reimbursement of costs incurred to implement a "program" under section 6.

In the present case, COGs are joint powers agencies established pursuant to the Joint Exercise of Powers Act (Gov. Code, § 6500 et seq.). They are made up of cities and counties that voluntarily become members of the joint powers authority. Under the Act, local agencies are authorized to enter into agreements to "jointly exercise any power common to the contracting parties."[39] The entity provided to administer or execute the agreement may be one or more of the parties to the agreement; a person, firm or corporation, including a nonprofit corporation, designated in the agreement; or a public entity, commission or board.[40] A joint powers authority is a separate entity from the parties to the agreement and is not legally considered to be the same entity as its contracting parties.[41]

A joint powers agency, such as a COG in this case, has only the powers that are specified in the joint powers agreement.[42] Unlike one of their city or county members, COGs do not have the independent statutory authority to levy and to collect tax revenue. Rather, they receive funds through membership dues paid with the proceeds of taxes of their city and county members.[43]

In addition, as explained below, COGs are not subject to the spending limitation prescribed by article XIII B. Article XIII B, section 8, subdivision (b), defines "appropriations subject to limitation" for local government to mean "any authorization to expend during a fiscal year the *proceeds of taxes levied by or for that entity* and the proceeds of state subventions to that entity (other than subventions made pursuant to section 6) exclusive of refunds of taxes... ." [Emphasis added.] As indicated above, COGs do not have the independent power to tax. Thus, the issue is whether their local agency members, which do have the power to tax, can levy taxes "for" the COGs, making those tax proceeds subject to the spending limitation of article XIII B.

In 1985, the Second District Court of Appeal, in *Bell Community Redevelopment Agency v. Woosley*, interpreted the phrase "taxes levied by or for an entity" in the definition of "appropriations subject to limitation" in article XIII B, section 8.[44] Although the *Bell* case

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[38] *Ibid; See also, Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 980-981, 985; and *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 280-281.

[39] Government Code section 6502.

[40] Government Code sections 6506, 6508.

[41] Government Code section 6507; 65 Opinions of the California Attorney General 618, 623 (1982).

[42] Government Code section 6508.

[43] See rebuttal comments of the Councils of Governments, page 9.

[44] *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24.

involved a redevelopment agency, the court's interpretation of the spending limit in article XIII B is instructive and relevant to this case.

The *Bell* court determined that the phrase "taxes levied by or for an entity" has a long-standing special meaning, dating back to an 1895 law that provided for the levy of taxes "by and for" municipal corporations. Based on the interpretation of the phrase, the court concluded that a local agency does not levy taxes for a redevelopment agency since a redevelopment agency does not have the power to tax. Thus, "costs" incurred by an entity that does not have the power to tax are not subject to the spending limit in article XIII B. The court's holding is as follows:

> This [1895] act allowed general law and charter cities to continue to exercise their taxing power directly or, if they so desired, to have the county levy and collect their taxes for them. [Citations omitted.] The legal effect of this arrangement, as explained by case law, was that the taxing power exercised was that of the city, and it remained in the city. The county officers in levying taxes for the city became ex-officio officers of the city and exercised the city's taxing power. [Citation omitted.] In levying taxes for the city the county was levying "municipal taxes" through the ordinary county machinery. [Citation omitted.]
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> Thus, the salient characteristics of one entity levying taxes "for" another entity are: (1) the entity for whom the taxes are levied has the taxing power; (2) the levying officers of the county exercise the taxing power of the entity for whom they are levying; (3) they exercise such power as ex-officio officers of that entity, and (4) the taxes collected are those of the "levied for" entity." *It is obvious that none of these characteristics has any applicability to the redevelopment process ... The first and foremost fact which mandates this conclusion is that a redevelopment agency does not have the power to tax. [Citation omitted.] That being the case, we resolve that the county is not levying taxes "for" the Agency.* (Emphasis added.)[45]

Similarly, a county or city member of a COG does not levy taxes for the COGs because COGs do not have the power to tax. Therefore, the "costs" incurred by COGs for this program are not subject to the tax and spend limitations of articles XIII A and XIII B. Accordingly, article XIII B, section 6 does not apply to COGs.

SACOG, in comments on the draft staff analysis, argues that, "because the COGs receive their revenue from dues paid by member agencies, the COGs' activities are paid for nearly exclusively from local agency tax revenues." So SACOG asserts that without state reimbursement "local tax revenues will be used to pay for the cost of the program." The Commission finds that using the tax revenue of other local agencies is not relevant to whether COGs are independently eligible as claimants. What is relevant, as stated above, is that (1) COGs do not have power to tax; and (2) COGs are not subject to the spending limitation under article XIII B because COGs' local agency members cannot levy taxes "for" the COGs to make the tax proceeds subject to the spending limitation of article XIII B.

This conclusion is further supported by the Legislature's interpretation of article XIII B, section 6 in section 17500 et seq., which the Legislature enacted as the "sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs

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[45] *Id.* at pages 32-33.

mandated by the state" as required by article XIII B, section 6.[46] Thus, the definitions of eligible claimants in the Government Code are the statutes that are relevant to an analysis of eligible claimants under article XIII B, section 6, and not the definitions in the Revenue and Taxation Code as asserted by SCAG.[47]

CSAC asserts that COGs are eligible claimants based on the Legislature's definition of "local agency" in section 17518, which defines "local agency" to mean "any city, county, special district, authority, or other political subdivision of the state." SCAG, ABAG, SACOG, CACOG, and SANDAG, in comments on the draft staff analysis, argue:

> The fact that cities, counties and special districts have the power to tax, does **not** mean the "authorities" must also have this same power. A less strained and more reasonable interpretation is that the Legislature intended to include all forms of cities, counties, and special districts including "authorities" and "political subdivisions" in its definition of local agencies." Joint powers authorities like COGs consist of cities and counties, and the term "political subdivision" includes "any city, city and county, county, tax or assessment district, or other legally authorized local governmental entity with jurisdictional boundaries." Govt. Code § 12650 (b)(3).
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> This interpretation is supported by the language of the statute: "[l]ocal agency' means any city, county, special district, authority, or other political subdivisions of the state." Govt. Code § 17518 (emphasis added). The use of the words "other political subdivision" implies that a city, county, special district, and authority each qualify as a political subdivision of the state. Indeed, this is consistent with the definition of "political subdivision."

The Commission disagrees with this interpretation of Government Code section 17518. Although the Legislature includes the word "authority" in the definition of local agency, it is not clear from the plain language of the statute what type of authority the Legislature intended to include within the definition. Since the language in section 17518 is unclear, the rules of statutory construction must be followed to determine legislative intent.

Under the rules of statutory construction, the courts will "seek to ascertain common characteristics among things of the same kind, class, or nature when they are cataloged in legislative enactments."[48] The California Supreme Court explained the rule as follows:

> The principle requires that when we interpret general statutory terms following the listing of specific classes of persons or things, we must construe the terms as applying to persons or things of the same general nature or class as those listed. The rule is based on the obvious reason that if the writer had intended the general words to be used in their unrestricted sense, he or she would not have mentioned

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[46] Government Code section 17552.

[47] Senate Bill No. 1102 (Stats. 2004, ch. 227), requires the Commission to reconsider this reimbursement determination, "under Section 6 of Article XIII B of the California Constitution in light of federal and state statutes enacted and federal and state court decisions rendered since this statute was enacted ... ."

[48] *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573.

the particular things or classes of things which would in that event become mere surplusage.[49]

In the present case, the Legislature placed the word "authority" next to the words "city, county, and special district" when defining eligible claimants for purposes of reimbursement under article XIII B, section 6. Thus, under the rule of statutory construction described above, it is presumed that the Legislature intended that an "authority" would be of the same general nature or class as a city, county or special district. Cities, counties, and special districts have the power to tax[50] and are subject to the spending limitation of article XIII B and, thus, are eligible claimants under article XIII B, section 6. Joint powers authorities, such as COGs, do not have the power to tax and are not subject to the spending limitation in article XIII B. Thus, joint powers authorities are not in the same class as a city, county, or special district for purposes of reimbursement under article XIII B, section 6.

Moreover, before 2004, the Legislature, in section 17520, specifically defined a "special district" that was eligible to claim reimbursement under article XIII B, section 6 to include a joint powers agency and a redevelopment agency. In 2004, the Legislature amended section 17520 to *delete* joint power agencies and redevelopment agencies from the definition of special district.[51] It is a fundamental rule of statutory construction that "the Legislature is deemed to be aware of ... judicial decisions already in existence, and to have enacted or amended a statute in light thereof."[52] In addition, it is presumed the Legislature intends to change the meaning of a law when it alters the statutory language by deleting express provisions of the statute.[53]

In the present case, two decisions by the courts of appeal were published before the Legislature amended section 17520, concluding that redevelopment agencies are not subject to article XIII B, section 6 since they are not bound by the spending limitations in article XIII B, and are not required to expend any proceeds of taxes.[54] As stated above, it is presumed that the Legislature was aware of these court decisions and deleted from the definition of "special district" the entities that were not subject to the tax and spend provisions of article XIII A and XIII B, i.e., redevelopment agencies and joint power agencies.

Thus, the deletion of joint power agencies from the definition of special districts in section 17520 supports the conclusion that the Legislature did not intend that the word "authority" in section 17518 included an authority, such as a COG, that does not have power to tax and is not subject to the spending limitations in article XIII B. A statute must be construed in the context of the entire

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[49] *Ibid.*

[50] Revenue and Taxation Code sections 93, 95.

[51] Statutes 2004, chapter 890 (Assem. Bill No. 2856).

[52] *People v. Harrison* (1989) 48 Cal.3d 321, 329.

[53] *People v. Mendoza* (2000) 23 Cal.4th 896, 916.

[54] *Redevelopment Agency, supra*, 55 Cal.App.4th at page 986. The Third District Court of Appeal adopted the reasoning of the *Redevelopment Agency* decision in *City of El Monte, supra,* 83 Cal.App.4th at page 281.

statutory scheme of which it is a part, in order to achieve harmony among its parts. It is not appropriate to confine interpretation to the one section to be construed.[55]

As to SANDAG's argument that the Board of Control decision and State Controller's Office Mandated Cost Manual support its contention that COGs are eligible claimants, the Commission disagrees. The Commission was ordered to reconsider the Board of Control decision by Senate Bill No. 1102 (Stats. 2004, ch. 227), "in light of federal and state statutes enacted and federal and state court decisions rendered since this statute was enacted ...." Senate Bill No. 1102 also requires the Commission to "amend the appropriate parameters and guidelines, and the Controller shall revise the appropriate reimbursement claiming instructions to be consistent with this act." The original Board of Control decision and State Controller's Office Mandated Cost Manual (containing the claiming instructions), therefore, are not relevant to whether COGs are eligible claimants, nor do they provide guidance on the issues. The decision and manual are the very documents the Legislature has ordered the Commission to reconsider.

Therefore, the Commission finds that the "costs" incurred by COGs are not the type of costs that are reimbursable under article XIII B, section 6. Accordingly, COGs are not eligible claimants for purposes of mandate reimbursement under article XIII B, section 6 or section 17500 et seq.

Although this conclusion by itself is sufficient grounds to deny the test claim, the Commission will also discuss the COG fee authority as a separate and independent ground to deny the claim.

III. Does the test claim legislation impose "costs mandated by the state" on COGs within the meaning of article XIII B, section 6 of the California Constitution and section 17556?

The Commission finds that, in addition to the COG eligibility issue discussed above, the fee authority of COGs is dispositive of the issues in this reconsideration. Therefore, there is no need to discuss whether the test claim statute constitutes a "program" within the meaning of article XIII B, section 6, or whether it is a "new program or higher level of service."

In order for the test claim statute to impose a reimbursable state-mandated program under the California Constitution, two criteria must be met. First, the test claim legislation must impose costs mandated by the state.[56] Second, no statutory exceptions listed in section 17556 can apply. Section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Section 17556, (as amended by Stats. 2004, ch. 895, Assem. Bill No. 2855), provides:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

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[55] *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1816.

[56] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

(a) The claim is submitted by a local agency or school district that requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.

(b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.

(c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

(e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposed duties that were expressly included in a ballot measure approved by the voters in a statewide or local election.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction. [Emphasis added.]

The issue, therefore, is whether COGs, even if deemed a "local agency," have the authority in subdivision (d) of section 17556, "to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

DOF argues that COGs have fee authority under section 65584.1 and therefore, the Commission cannot find there are costs mandated by the state.

Senator Ducheny also states that the Legislature provided fee authority to COGs in section 65584.1 for the activities in the test claim statute, "and for local governments in turn to pass these costs on to developers as fees." According to the Senator, this fee authority was intended to meet the requirement in section 17556, subdivision (d).

CACOG argues that applying the fee authority would violate the state and federal constitutional provision against impairment of contracts because the joint powers agreements between COGs and member cities/counties are contracts that contain the only terms for amending them. CACOG reiterates the LCC's position that a COG fee on a local government that is not used for a local purpose, but for a statewide purpose, is actually a tax and therefore invalid.

SACOG concurs with and incorporates the CACOG's and LCC's comments, and asserts:

- Section 65584.1 does not grant legitimate fee authority and does not exempt regional housing needs assessments from reimbursement. Because COGs have only the powers enumerated in their fee agreements with member agencies, COGs have no power to levy fees because member agencies would have to amend their joint powers agreements to grant COGs this authority. The fee authority, according to SACOG, is not real authority because it cannot be exercised until the member agencies authorize it.
- Moreover, SACOG points out that if the joint powers agreements were amended to include a fee, some member agencies may withdraw from the COG, in which case the housing needs assessments would need to be conducted by the state. HCD may delegate this to the local agency if it has the resources and capability, and the local agency agrees to prepare the assessment. Under the new fee statute, COGs can only request that local agencies be subject to the new fee, and cities and counties likely do not have fee authority. According to SACOG, "Government Code section 65584.1 hinges on the hope that local agencies, and in turn, developers, will agree to pay the costs of the regional housing needs determination, despite the lack of genuine authority to levy such fees."
- In February 2005 comments on the draft staff analysis, SACOG argues that the issue is not one of the fee authority's convenience or political expediency. SACOG reiterates its argument that, "fees authorized by Government Code section 65584.1 are not legitimate fees, and that local agencies will not be able to levy these fees at all." [Emphasis in original.]

SCAG's comments that:

- Whether COGs may actually impose the fee in section 65584.1 is an unresolved issue, and therefore, until it is resolved, it is premature for the Commission to determine whether 65584.1 affects reimbursability of the regional housing needs assessment process.
- The COG's authority to collect fees amounts to COGs collecting from themselves.
- Until the issue of the validity of section 65584.1's fee authority is resolved, the fee constitutes an unconstitutional local tax. SCAG restates these arguments in commenting on the draft staff analysis.

Rebuttal comments submitted by SCAG, ABAG, SACOG, CACOG and SANDAG, repeat some of SCAG's arguments, stating:

- COG fee authority amounts to COGs collecting it from themselves.
- COGs have no authority to assess fees on their members unless their joint powers agreements empower them to, but that none of the agreements do. Thus, COGs lack authority to impose fees on their members without amending the agreements.
- To force COGs to assess fee authority would, under the contracts clause, unconstitutionally interfere with their agreements (Cal. Const., art. I, § 9).
- Even if COGs have fee authority, the cities and counties cannot pass the fees onto developers because they do not have authority to levy fees to offset costs incurred by

other agencies such as COGs. Rather, their fee authority only pertains to offset costs incurred by the city or county's own planning agency.

- Also, since the regional housing needs assessment does not provide a direct benefit to developers, the reasonable cost of providing the service would be difficult or impossible to determine.

LCC also asserts, regarding the fee authority of section 65584.1, that:

- This fee authority provides neither the COGs nor cities and counties with valid authority to impose fees for the distribution of regional housing needs. LCC asserts that the COG fee authority "unconstitutionally interferes with the organic structure of these councils of governments." Because COGs exist pursuant to a joint powers agreement between them and their cities and counties, LCC argues that the fee authority statute violates the state constitution when the agreement does not authorize the imposition of fees.
- Assuming there is COG fee authority, section 65584.1 purports to authorize the city or county to impose a fee on developers to reimburse itself for the COG fee. Section 65584.1 requires the fee to be imposed pursuant to section 66106, which limits the fee to the estimated cost of providing the service. However, the city or county is not providing the service to the developer, nor did the city or county incur costs to distribute regional housing needs. Since the COG provided the service and incurred the cost, LCC argues that the pass through fee is a tax that requires voter approval.

CBIA also presents various arguments against the fee authority in section 65584.1.

- Allowing costs of state-mandated regional planning to promote housing to be passed onto cities and counties, and from there to homebuilders, would further exacerbate the difficulties of providing affordable housing.
- Section 65584.1 does not provide authority for COGs to pass on their state-mandated costs to homebuilders or homebuyers by way of city or county fees. According to CBIA, COGs that use section 65584.1 would impair or interfere with their joint powers agreements in violation of the contracts clause of the California constitution. CBIA also argues that even if a COG implemented this new fee authority, the statute provides no guidance on how it could be lawfully implemented.
- The fee statute does not provide a valid basis for cities and counties to pass through costs they may incur for the support of the housing needs work performed by the COGs, and would not provide a basis for a valid fee for several reasons:
    - First, there is no basis for seeking reimbursement of costs incurred by other agencies. City/county fee authority is limited to the reasonable costs imposed on the city or county. There is no authority "to impose fees on private property owners or developers to 'reimburse' costs incurred by others."
    - Second, article XIII D of the California Constitution prohibits imposing a fee for general governmental services (art. XIII D, § 6, subd. (b)(5)). The fee prohibition applies to services available to the public at large in substantially the same manner as property owners. Because the service provided by COGs in distributing regional housing needs is available to the community on an equal basis, and "regional housing is a matter of statewide concern," charging a fee for

it is constitutionally prohibited. Also prohibited is a fee on property owners unless the service is actually used by, or immediately available to them (art. XIII D, § 6, subd. (b)(4)). The fee cannot be based on potential or future use of a service. Thus, any city/county fee for housing elements would actually be a tax requiring voter approval.

- Third, the fee authorized by section 65584.1 would not meet the criteria for the two types of fees recognized by the California Supreme Court: development and regulatory fees. A development fee is defined "for the purpose of defraying all or a portion of the cost of public facilities related to the development project." (Gov. Code, § 66000, subd. (b)). The planning costs in section 65584.1's fee do not defray costs of public facilities, nor do they defray impacts caused by particular development projects, as required by law, and therefore do not constitute a lawful development fee. Since housing element activities are incurred independent of any particular development project, regardless of the level of development, and even in its absence, development fees imposed for housing element activities would be unlawful. Regulatory fees, according to CBIA, would also not apply to this case because they cannot exceed the reasonable cost of providing the service or regulatory activity for which they are charged, and they cannot be levied for general revenue purposes. CBIA argues that there is no regulatory function for this fee, as COGs have no role regulating individual housing development projects. Rather, the intent is to raise revenue to free the state from reimbursing the state-mandated program.

- Finally, according to case law CBIA cites, conditions on development unrelated to the use of the property, that shift the burden of providing the costs of a public benefit to another not responsible or only remotely or speculatively benefiting from it, is an unreasonable exercise of the police power. CBIA also asserts that there must be a reasonable nexus between development activity and exactions imposed as a condition of that activity.

In response to SCAG's argument that the validity of section 65584.1 is unresolved so the Commission's decision would be premature, the Commission disagrees. The issue is not premature because the fee authority statute became effective August 16, 2004.[57] So by law, COGs have the authority to charge a fee as of August 16, 2004.

As to SCAG's argument that COGs are in reality collecting from themselves, the Commission also disagrees. COGS, as joint powers authorities, are legally separate entities from the parties to the agreement.[58] Each entity has separate funds, which are accounted for separately.[59] Thus, the Commission disagrees that COGs are collecting from themselves by collecting fees from member agencies.

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[57] Statutes 2004, chapter 227, section 58 (Sen. Bill No. 1102). The statute was amended by Statutes 2004, chapter 818, section 1 (Sen. Bill No. 1777).

[58] Government Code section 6507; 65 Opinions of the California Attorney General 618, 623 (1982).

[59] Government Code sections 6504 and 6505.

In response to the arguments by CACOG, SCAG, LCC and CBIA that the fee authority of section 65584.1 impairs contracts, or SACOG's argument that this fee authority is not legitimate, the Commission also disagrees. The Commission, as an administrative agency, has no authority to declare a statute unconstitutional. Article III, section 3.5 of the state Constitution states:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional.
>
> (b) To declare a statute unconstitutional.
>
> (c) To declare a statute unenforceable, or refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

In 1988, the California Supreme Court, in *Reese v. Kizer*,[60] described the purpose of article III, section 3.5. This provision was added to the Constitution in 1978 through Proposition 5. The purpose of the amendment was to prevent administrative agencies from using their own interpretation of the Constitution to thwart the mandates of the Legislature.[61] According to the ballot materials in support of Proposition 5, the proponents argued that the amendment would "insure that appointed officials do not refuse to carry out their duties by usurping the authority of the Legislature and the Courts."[62]

The Commission finds, therefore, that the Commission has no power to declare section 65584.1 unconstitutional or refuse to recognize it because no appellate court has determined that it is unconstitutional.

In the final analysis, the Commission finds that the test claim legislation does not impose "costs mandated by the state" on COGs because of the existence of fee authority in section 65584.1.

Section 65584.1 (added by Stats. 2004, ch. 227, Sen. Bill No. 1102, and amended by Stats. 2004, ch. 818, Sen. Bill No. 1777) states:

> Councils of government may charge a fee to local governments to cover the projected reasonable, actual costs of the council in distributing regional housing needs pursuant to this article. Any fee shall not exceed the estimated amount required to implement its obligations pursuant to Section 65584. A city, county, or city and county may charge a fee, not to exceed the amount charged in the aggregate to the city, county, or city and county by the council of governments, to reimburse it for the cost of the fee charged by the council of government to cover the council's actual costs in distributing regional housing needs. The legislative body of the city, county, or city and county shall impose the fee pursuant to

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[60] *Reese v. Kizer* (1988) 46 Cal.3d 996.

[61] *Id.* at page 1002.

[62] *Id.* at page 1002, footnote 7.

> Section 66016, except that if the fee creates revenue in excess of actual costs, those revenues shall be refunded to the payers of the fee.

This fee authority is plenary authorization to charge fees for services. The only limitation on the COG fee is that it "not exceed the estimated amount required to implement its obligations pursuant to Section 65584."

In *Connell v. Superior Court of Sacramento County*,[63] the court considered whether regulations that increased the purity of recycled water resulted in a reimbursable mandate. The *Connell* court found the fee authority is a question of law, so the evidence submitted regarding the fee's economic feasibility or sufficiency was not relevant.[64] The water districts' possession of the fee authority was dispositive of the question of the existence of a reimbursable mandate. The court rejected the districts' arguments that the fee would not be "sufficient to pay for the mandated costs" because it is unfeasible or economically undesirable for the districts to recover their costs.[65] As the *Connell* court stated:

> On appeal, appellants argue the sole inquiry is whether the local agency has "authority" to levy fees sufficient to pay the costs, and it does not matter whether the local agency, for economic reasons, finds it undesirable to exercise that authority. ... [¶] ... [¶] We agree with appellants."[66]

The *Connell* court first explained the purpose of subvention. As the California Supreme Court stated regarding article XIII B, section 6 of the California Constitution, "Section 6 requires subvention only when the costs in question can be recovered solely from tax revenues."[67] In upholding the constitutionality of the fee authority provision in section 17556, the Supreme Court stated that it "effectively construes the term 'costs' in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound."[68]

The *Connell* court went on to interpret the plain meaning of "fee authority" in section 17556, subdivision (d) as the "right to exercise powers," or the "power or right to give commands [or] take action ...."[69] The court rejected interpreting the statute to mean "a practical ability in light of surrounding economic circumstances," stating that if that had been the legislative intent, the Legislature would have used the term "reasonable ability" in the statute rather than "authority."[70]

The *Connell* court also considered an argument that "fees levied by the districts 'cannot exceed the cost to the local agency to provide such service,' because such excessive fees would

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[63] *Connell v. Superior Court of Sacramento County* (1997) 59 Cal.App.4th 382.

[64] *Id.* at page 400.

[65] *Id.* at page 399.

[66] *Id.* at page 400.

[67] *Id.* at page 398, citing *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487.

[68] *Ibid.*

[69] *Id.* at page 401.

[70] *Id.* at page 400-401.

constitute a special tax."[71] The court stated that no one is suggesting the districts levy fees that exceed their costs.

The Commission finds the reasoning of the *Connell* case applies to this test claim reconsideration. Section 65584.1's fee authority provision grants authority to COGs for the "council's actual cost in distributing regional housing needs." The only limitation on the COG fee is that it "not exceed the estimated amount required to implement its obligations pursuant to Section 65584."

In view of *Connell,* the Commission does not find convincing the various arguments regarding the sufficiency or the difficulty of the basis for the fee. These arguments are not relevant to the legal inquiry because the sole consideration is whether COGs have fee authority.[72]

The Commission finds, therefore, that because COGs possess fee authority based on section 65584.1, COGs cannot be reimbursed for their activities in developing the regional housing needs analyses.

CONCLUSION

The Commission finds that the test claim legislation (Stats. 1980, ch. 1143) does not impose "costs mandated by the state" on COGs within the meaning of article XIII B, section 6 of the California Constitution and section 17556, subdivision (d) because (1) COGs are not eligible claimants for purposes of mandate reimbursement under article XIII B, section 6; and (2) the test claim legislation does not impose "costs mandated by the state" on COGs within the meaning of article XIII B, section 6 and Government Code section 17556 because of the COGs' fee authority provided in Government Code section 65584.1.

[71] *Id.* at page 402.

[72] *Id.* at page 400.

PROOF OF SERVICE

I, Cynthia Pacheco declare:

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Fulbright & Jaworski L.L.P., 865 South Figueroa Street, 29th Floor, Los Angeles, California 90017.

On May 5, 2005, I served the within document(s):

Request for Reconsideration of Statement of Decision

on the interested parties to this action as follows:

Eric D. Feller, Esq.
Commission on State Mandates
980 9th Street, #300
Sacramento, CA 95814
Emailed to: csminfo@csm.ca.gov

☐ (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

☒ (BY FEDERAL EXPRESS) I placed the document(s) listed above in a sealed Federal Express envelope affixed with a pre-paid air bill, and caused the envelope to be delivered to a Federal Express agent for delivery.

☐ (BY PERSONAL SERVICE) I caused the aforementioned document(s) to be personally served at the office of the addressee.

☐ (BY FACSIMILE) I caused said document(s) to be transmitted electronically to the interested parties at the facsimile numbers as stated above on this date before 5:00 p.m.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 5, 2005, at Los Angeles, California.

Cynthia Pacheco

Cynthia Pacheco

--oOo--

ORIGINAL

PUBLIC HEARING

COMMISSION ON STATE MANDATES

--oOo--

TIME: 9:32 a.m.

DATE: Wednesday, March 30, 2005

PLACE: Department of Social Services
744 P Street, First Floor Auditorium
Sacramento, California

--oOo--

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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A P P E A R A N C E S

COMMISSIONERS PRESENT

ANNE SHEEHAN
(Commission Chair)
Representative for TOM CAMPBELL
Director
Department of Finance

JAN BOEL
Acting Director
State Office of Planning and Research

FRANCISCO LUJANO
Representative for PHILIP ANGELIDES
State Treasurer

NICHOLAS SMITH
Representative for STEVE WESTLY
State Controller

--o0o--

COMMISSION STAFF PRESENT

PAULA HIGASHI
Executive Director

PAUL M. STARKEY
Chief Legal Counsel

ERIC FELLER
Commission Counsel

NANCY PATTON
Assistant Executive Director

KATHERINE TOKARSKI
Commission Counsel

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A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 3: *continued*

For Cost Recovery Systems, Inc.

ANNETTE S. CHINN
President
Cost Recovery Systems, Inc.
705-2 East Bidwell Street, Suite 294
Folsom, CA 95630

Appearing Re Item 5:

For Association for Bay Area Governments

SCOTT HAGGERTY
President
Association for Bay Area Governments
Hotel Claremont
Berkeley, CA 94705

ROSE JACOBS GIBSON
Executive Board Member
Association for Bay Area Governments
and
County Supervisor
San Mateo County

For Southern California Association of Governments (SCAG):

KAREN L. TACHIKI
Chief Counsel
Southern California Association of Governments (SCAG)
818 West Seventh Street, 12th Floor
Los Angeles, CA 90017-3435

LYNN HARRIS
Southern California Association of Governments (SCAG)
818 West Seventh Street, 12th Floor
Los Angeles, CA 90017-3435

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 5: *continued*

For Association of Councils of Governments

RUSTY SELIX
Executive Director
Association of Councils of Governments

For the Department of Finance:

SUSAN S. GEANACOU
Senior Staff Attorney
Department of Finance
915 L Street
Sacramento, CA 95814

Appearing Re Item 7:

For Claimant Clovis Unified School District

KEITH B. PETERSEN, MPA, JD
President
SixTen and Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

For the Department of Finance:

SUSAN S. GEANACOU
Senior Staff Attorney
Department of Finance
915 L Street
Sacramento, CA 95814

that will be included in the final Statement of Decision.

CHAIR SHEEHAN: All right, any discussion on this matter from the Commission members?

(No audible response was heard.)

CHAIR SHEEHAN: Is there a motion?

MEMBER BOEL: I move that we adopt the recommendation.

CHAIR SHEEHAN: And a second?

MEMBER LUJANO: Second.

CHAIR SHEEHAN: All right. All those in favor, signify by saying "aye."

(A chorus of "ayes" was heard.)

CHAIR SHEEHAN: Opposed?

MEMBER SMITH: Similarly, we will abstain from this as well.

CHAIR SHEEHAN: Abstain?

So let the minutes reflect that the Controller abstained on that also.

Thank you. That motion carries.

And we will move on to Item 5.

I assume -- this is yours again; right?

MR. FELLER: Yes.

CHAIR SHEEHAN: All right.

MR. FELLER: This is the reconsideration of the *Regional Housing Needs Determination: Councils of*

Governments. The reconsideration of Board of Control decision on Claim 3929 was requested by the Legislature in SB 1102.

California Association of Councils of Governments and other COGs, including Sacramento Area Council of Governments, San Diego Association of Governments, Southern California Association of Governments, and the Mendocino Council of Governments, submitting comments, in addition to the League of California Cities, California State Association of Counties, and the California Building Industry Association, all of which argue that the activities in the Parameters and Guidelines issued by the Board of Control should continue to be reimbursable.

Again, comments from Senator Ducheny and the Department of Finance took the opposite view.

For reasons stated in the analysis, staff finds that, first, Councils of Governments are not eligible claimants for purposes of mandate reimbursement under Article XIII B, section 6, of the California Constitution. And as an alternative grounds for denial, the test claim legislation does not impose costs mandated by the state on COGs within the meaning of Article XIII B, section 6, and Government Code 17556 because COGs have the authority provided in the Government Code section 65584.1. Therefore, staff

recommends that the Commission adopt the analysis and deny Board of Control Claim Number 3929, effective July 1, 2004.

Staff recommends that the parties and witnesses first address their testimony to the Commission to the issue of COG eligibility, followed by the fee-authority issue.

Would the parties and witnesses please come forward and state your names for the record?

MR. HAGGERTY: Good morning. Scott Haggerty. ABAG.

MS. GIBSON: Good morning. Rose Jacobs Gibson, representing ABAG.

MS. TACHIKI: Karen Tachiki, representing SCAG.

CHAIR SHEEHAN: All right.

MS. HARRIS: Lynn Harris, representing SCAG.

MS. GEANACOU: Susan Geanacou, Department of Finance.

CHAIR SHEEHAN: Mr. Haggerty, do you want to go first?

MR. HAGGERTY: Thank you, Madam Chair. Good morning to the Commission and staff. As I stated, my name is Scott Haggerty, I'm the president of the Association of Bay Area Governments, which represents nine Bay Area counties in 100 cities in the San Francisco Bay Area. And I would like to add that that is strictly a

membership organization.

ABAG was the claimant in the 1981 decision that COGs are eligible for subventions for housing needs.

Other than specific funding grants, ABAG's revenues come directly from its membership fees, which I would like to add, come from proceeds of taxes.

Commission staff states that because COGs do not have the power to tax, COGs must be treated like redevelopment agencies, which also do not have the power to tax, which courts have ruled are ineligible for state subventions.

However, unlike RDAs, ABAG has no dedicated source of revenues that it can use to perform the state mandates' housing needs.

My colleague, Rose Jacob Gibson from San Mateo County, will address that in greater detail.

In our opinion, it would be absurd for the State to refuse to fund ABAG for the housing needs because ABAG cannot impose a tax to fund it. To avoid this absurd result, the Legislature grants COGs the power to impose a fee on the cities and counties to perform housing needs.

This solution is simply untested and inadequate. Untested because there are legal arguments presented to the Commission by attorneys of ABAG, SCAG, SANDAG, SACOG, Cal COG and others which cast serious doubts on the

legality of the fee. Impractical because there are serious obstacles to implementing this fee.

First, as a membership organization, ABAG is governed by a general assembly and, therefore, also an executive board, which represents our members to vote on issues of importance, including the imposition of this fee. ABAG member cities and counties would not tax themselves to fund a state mandate.

Second, even if the majority of the membership imposed the fee, there would be a problem in collecting these fees from those who do not want to support the fee.

I would just say that the specter of numerous lawsuits would multiply in the courts to collecting this fee is frightening.

I would also like to say, as we went through this process last time, there were a lot of cities that were very unhappy with ABAG. And, therefore, I think their unhappiness would result in holding back the fees.

Compare this to the RDA that receives its tax increment by right, and you will get a sense of just how inadequate the proposed fee would be.

In closing, ABAG respectfully urges the Commission to recognize that the legislative solution for housing needs is inadequate and it affirms its prior decisions.

Thank you very much, Madam Chair.

CHAIR SHEEHAN: Any questions for Mr. Haggerty?

(No audible response was heard.)

CHAIR SHEEHAN: All right.

Ms. Gibson?

MS. GIBSON: Good morning to the Commissioners. I'm Rose Jacobs Gibson, and I'm a County Supervisor for San Mateo County and serve on the ABAG executive board as well.

As you know, housing supply and affordability are one of the top issues in the San Francisco Bay Area, and as well as throughout the entire state.

The Association of Bay Area Governments, ABAG, is committed to any program which effectively addresses this issue. ABAG completed the last round of the housing needs in 2001. This process was open and fair, and the discussion was sensible, and the allocations were adopted with only one dissenting vote by our 38-member executive board.

Based on the Department of Housing and Community Development statistics, 73 percent of the Bay Area's local housing elements are certified, exceeding the statewide average.

This year ABAG is scheduled to begin work on the housing needs' fourth revision. Housing needs is more complex due to the changes in the last legislative

session. We'll be having workshops so we can be sure to clarify all of those legislative initiatives.

These changes reflect extended discussions amongst state departments of HHCD, the cities, the counties, the COGs, to improve housing needs and make it more effective for its purpose.

The San Francisco Bay Area is the first region scheduled to undertake the housing needs under this new process. ABAG is already months behind due to the funding uncertainty.

If ABAG is not funded by the State for this mandated program, it is highly unlikely that the local funds would be available. This would be unfortunate. The State loses the opportunity to have its program implemented, and the San Francisco Bay Area loses opportunity to improve its housing supply, as well as the affordability.

It is ironic that in those areas without COGs, HCD currently does the housing needs. Therefore, in the real sense, without COGs, the state would be responsible for performing this function.

ABAG is better-suited to do the job and has achieved effective and successful results. State funding is the only way to ensure that this continues to occur.

And finally, it must be pointed out that funding housing needs with fees from our members depends on

passing through these fees to developers. Fees that will increase the costs of housing. This is simply bad policy.

ABAG respectfully urges the Commission to uphold its prior decisions and allow the housing needs process to go forward. And I certainly hope that you would consider this because we certainly do not want to have to go through court proceedings and all of that. The fact that this is legal authority does not mean it's practicable for us to do the work that we need to do.

CHAIR SHEEHAN: Thank you.

Any questions for Ms. Gibson from the Commission Members?

(No audible response was heard.)

CHAIR SHEEHAN: Okay. Okay, go ahead.

MS. TACHIKI: Good morning, members of the Commission. My name is Karen Tachiki. I'm the chief counsel for the Southern California Association of Governments. And I'm here today with my colleague, Lynn Harris, who is the manager of Community and Economic Development at SCAG, and is also available to answer any of your questions or concerns.

SCAG, as you may know, is the largest of nearly 700 Councils of Governments across the United States. It is a joint powers agency established pursuant to the

California Government Code requirements. We are a federally-designated metropolitan planning organization and, as such, we have certain federally-mandated duties. But we're here today to talk about state-mandated duties.

Under state law, as you know, there must be a state and regional housing needs assessment, which determines protected housing construction needs for the region, which is based on population figures, projections established by the Department of Finance, and the regional population projections and forecasts developed by SCAG, which we also use in the preparation of our regional transportation plan.

SCAG, under state law, must allocate the shares of the regional housing needs to cities and counties within its region and, in turn, in some cases, has delegated that responsibility to subregions who have agreed to accept it.

This process is enormously expensive to SCAG. And just to give you some idea, in the last go-around of the RHNA process, SCAG placed a reimbursement claim to your Commission in excess of $840,000. This is a lot of money. And that should be viewed in the context of the membership dues which are paid by the cities and counties, members of SCAG. This year, the total membership dues are $1.4 million.

And so if we were required to, in turn, assess our members, you're asking us to substantially raise those fees which are paid by our members.

And we, like ABAG, have no other source to undertake the RHNA process.

So this issue is of great significance to SCAG, and clearly is of great significance to the other COGs, which is demonstrated by ABAG's appearance here today; and the fact that some of our briefs, if you would note, were filed as joint briefs with other COGs, indicating its overall importance to all of us.

I commend you to our written briefs. We've made several written submissions to you, so I don't want to belabor the legal arguments that are made there. But I do want to highlight just a couple of issues.

And in deference to Mr. Feller's request, the first issue that he asked to be addressed was the question of whether or not COGs have -- since they do not have the power to tax, whether they are eligible claimants under law. We believe that the basis for the staff's recommendation is based on a very strained interpretation of the definition of "local agency."

The staff believes, because local -- because COGs, joint powers authorities in this case, do not have the power to tax, they are not in the same class, so to

speak, as cities, counties, et cetera. But there is nothing in the statute which requires that all of the agencies which are listed, have all of the exact, same common powers. There is nothing in the statute, and the staff analysis has pointed to no case law, nor any other indication that requires that all powers be common in that listing of agencies.

In fact, the definition talks about "other political subdivisions of the state," a broader and more encompassing term. And there is no doubt, the joint powers agencies composed solely of public agencies, indeed, would fit within that definition.

Moreover, you've heard a lot of discussion today about the ability to impose the fees. The Legislature seems to have provided by statute that COGs may impose fees upon its cities and counties. But what the staff analysis does not address is, COGs are established solely by agreement of their agencies. If we do not amend our joint powers agreement, we do not have the authority to levy that fee. And the Legislature having provided this so-called authority, cannot force the COGs to change their own agreements.

And I would just point out to you that under the statute, which establishes and providers the parameters for how you establish a joint powers authority, the

Legislature itself says that a JPA can exercise only those powers that are provided for by agreement. Therefore, COGs do not -- SCAG does not have the ability to impose the fees.

So we would ask you to consider those points and to reaffirm the decision that BOC made earlier.

CHAIR SHEEHAN: Thank you.

Any questions?

(No audible response was heard.)

CHAIR SHEEHAN: Okay, Ms. Geanacou, do you want to --

MS. GEANACOU: Susan Geanacou, Department of Finance.

As with the prior agenda item, the Department of Finance submitted written comments on this matter in November of 2004, addressing both the eligibility of COGs to be claimants in this matter, and also regarding the fee authority aspect of the staff analysis. The staff analysis that is before you today is consistent with our submission, and we stand on our submission.

I am available to answer any questions.

CHAIR SHEEHAN: Great.

Any questions for Ms. Geanacou?

(No audible response was heard.)

CHAIR SHEEHAN: Thanks.

Anyone else in the audience who would like to testify?

Yes, please.

MR. SELIX: Yes, my name is Rusty Selix. I'm the Executive Director of the Association of Councils of Governments.

And I don't wish to add to any of the legal arguments but wish to point out that this, in the view of all the Councils of Governments, can be viewed as an unfunded mandate. There is no ability for Councils of Governments to collect a fee because there is no one that comes before Councils of Governments as an applicant. They are not like local governments, where people come to them for services, like the local governments. So it won't work, it doesn't work, and we're headed to court, if you persist in pursuing this.

We think a much better course of action would be to tell the Legislature and the Department of Finance that this is not a workable solution to funding this mandate, and not approve this decision, which will send it back to the Legislature and the Department of Finance to figure out something that might work.

This one inevitably will end up in court. We will not be able to do regional housing needs under this funding scheme.

CHAIR SHEEHAN: Thank you, Mr. Selix.

Any questions?

(No audible response was heard.)

CHAIR SHEEHAN: Mr. Feller, do you want to address any of the points that were raised?

I would like you to address the eligibility issue and respond to the comments that were made.

Thanks.

MR. FELLER: Yes, with regards to the eligibility issue, based on the case law, the Bell Community Redevelopment Agency v. Woolsey case, interpreting Article XIII B of the Constitution, staff finds that the only relevant authority for eligibility is the power to tax. Because that's the sole consideration for eligibility, staff finds that COGs would not be eligible claimants.

And then with regards to the Legislature a couple years ago taking out redevelopment agencies and joint powers agencies from the definition of the "eligible claimant," and the statutory scheme with the fact that the Legislature recognized that.

CHAIR SHEEHAN: Any other comments you would like to respond to?

MR. FELLER: Most of the other comments, I believe, went to the practical problems and the cost of housing.

Again, those are practical considerations. And with regards to the fee, the Connell case, we believe that it controls, that it's the legal authority that's relevant.

CHAIR SHEEHAN: Okay, comments from -- yes, Mr. Smith?

MEMBER SMITH: Thank you, Madam Chair.

There appears to be two questions before the Commission today, the two rationale provided by staff.

And I don't know the best way to do this; but the Controller would like to take the two questions separately.

CHAIR SHEEHAN: You mean, the issue and the eligibility versus --

MEMBER SMITH: The eligibility overall versus the specific eligibility for the Regional Housing Needs Assessment program.

CHAIR SHEEHAN: The eligibility of the COGs?

MEMBER SMITH: Of the COGs.

CHAIR SHEEHAN: Separating that issue out and take a separate --

MEMBER SMITH: Right. The two rationale, take it separately.

CHAIR SHEEHAN: Okay. I think we can accommodate that.

So do you want to make a motion on the first?

MEMBER SMITH: I'd like to -- well, yes, I would like to make a motion --

CHAIR SHEEHAN: Wait.

Paul, did you --

MR. STARKEY: I just think that there probably should be a motion as to that procedure. Again, if the other Commission members agree, then we can go forward on that.

CHAIR SHEEHAN: All right.

MEMBER SMITH: In that case, I'd like to move that we take the two rationale separately and vote first, on whether or not Councils of Governments are eligible claimants for purposes of mandate reimbursement under Article XIII B, section 6. And then taking it separately, the test claim legislation that does not impose costs mandated by the state on Councils of Governments for the particular program under consideration, *Regional Housing Needs Determination*.

MEMBER BOEL: I have some questions about that.

I'd like Eric's comments on dividing them, because everything has been presented as a unit here.

MR. FELLER: Well, I'll defer -- I will ask for Mr. Starkey's opinion.

But my initial reaction is that the Commission could do that.

If you do decide to do that and if the votes were different on the two questions, I would recommend that we take the Statement of Decision back and put in the rationale for making that bifurcation and bring it back at the next meeting.

MEMBER SMITH: Well, the other possibility that we'd be okay with, is taking the Statement of Decision -- taking a vote on whether to include the first rationale as a reason for denial of the test claim.

MR. STARKEY: It's perfectly acceptable to separate out those two issues and vote on it. The only thing that I think as a matter of procedure, the Commission needs to vote on that motion which is on the floor. And then if they agree to do it that way, then we will just move forward from that position.

Currently, the way that it's been posed is as a proposed staff recommendation.

CHAIR SHEEHAN: The proposed staff recommendation addresses both of the issues.

MR. STARKEY: Correct.

CHAIR SHEEHAN: The eligibility issue, as well as the fee authority issue.

MR. STARKEY: Correct, because both are listed separately and independently, as separate grounds to deny the test claim.

CHAIR SHEEHAN: So we have a -- Mr. Smith made a motion to separate the two issues.

Did you get your questions --

MEMBER BOEL: Well, no, I'm still not sure.

If we separate the two issues and there's different votes on the two issues, then are we -- we're voting on the whole test claim, based on one issue, and then we're voting on the whole test claim based on the other issue?

CHAIR SHEEHAN: Well, I think -- my interpretation would be that what staff has explained, is the recommendation on the staff analysis bases their recommendation on two issues: The eligibility, as well as do they have the taxing authority to collect this. And that if the Commission were to vote to say that the COGs are eligible, they could still vote to deny the claim based on the taxing issue, or they can say that the COGs are not eligible, and deny it based on the eligibility, as well as the tax issue, if they'd like.

MEMBER BOEL: Okay.

CHAIR SHEEHAN: I mean I don't know if you want to --

MR. STARKEY: Yes.

CHAIR SHEEHAN: In the next -- so we have a motion.

Do we have a second to Mr. Smith's motion?

MEMBER LUJANO: I actually have another question.

CHAIR SHEEHAN: Okay.

MEMBER LUJANO: If we do separate them, and the first motion -- or the first item is that they're not eligible, and we all vote "yes" or if the motion carries --

CHAIR SHEEHAN: Right.

MEMBER LUJANO: -- then would it matter if they have fee authority or not? I mean, I'm not sure why you'd go to the second one, if the first one -- if they're not eligible.

MR. STARKEY: That would be up to the Commission, if they want to deny it on both grounds. The grounds are listed as separate alternative grounds for denial. And it's stated that way in the proposed recommendation.

MEMBER LUJANO: Okay.

MR. STARKEY: So that's a possible 'nother issue.

CHAIR SHEEHAN: Then the eligibility is the threshold issue, and then it sort of begs the issue on the second one.

MR. STARKEY: I will point out, however, that as a hypothetical, if it were found that the motion -- if it's decided that they are not eligible claimants and the Commission stops there, and that decision was then challenged in the court, that would be the sole issue before the court. And if things go the way I would hope

they would go in the court, we would request that the court remand it back to the Commission for further consideration, because the Commission never reached the underlying merits of that case.

CHAIR SHEEHAN: Well, and if the court said they were eligible, we'd still have to then come back, as you say, on the underlying merits of the case.

MR. STARKEY: It would be my hope that the court would send it back.

CHAIR SHEEHAN: Yes, that could be a possibility.

So, all right, any other -- well, we have a motion on the table.

Is there a second?

MEMBER LUJANO: I'll second.

CHAIR SHEEHAN: Okay, so we have a motion and a second.

And the motion is to divide the issues before us in the staff recommendation on the eligibility. So the vote that we're taking now is on the motion to divide the two issues.

All those in favor of the motion, signify by saying "aye."

(A chorus of "ayes" was heard.)

CHAIR SHEEHAN: Opposed?

MEMBER BOEL: Opposed.

CHAIR SHEEHAN: And I will oppose also.

MEMBER BOEL: So what happens now?

MR. STARKEY: The motion fails.

CHAIR SHEEHAN: It has to pass by a vote of three.

MEMBER SMITH: In that case, Madam Chair, may I make a couple comments about that?

CHAIR SHEEHAN: Yes.

MEMBER SMITH: The Controller believes that until it has further legislative guidance, that the Councils of Governments are eligible claimants, there may be instances where they are, in the future; we don't believe that the courts have specifically addressed Councils of Governments as an eligible claimant.

Like I said before, in Item 3, we disagree with the policy; but that's not our job up here to vote on whether or not we think the policy is a good idea. We think that there are going to be considerable challenges for Councils of Governments to comply with this legislation, and that there may be a fee authority -- whether it's sufficient fee authority is the question -- and we don't believe we have enough facts before us today to vote on it. And so we'll abstain from this item.

CHAIR SHEEHAN: Thank you.

So then do we have a motion on the staff recommendation?

MEMBER BOEL: Yes. I move that we adopt this analysis and deny the Board of Control claim.

CHAIR SHEEHAN: Is there a second?

MEMBER LUJANO: Second.

CHAIR SHEEHAN: All right, so we have a motion and a second.

Any further discussion?

All those in favor, signify by saying "aye."

(A chorus of "ayes" was heard.)

CHAIR SHEEHAN: Opposed?

(No audible response was heard.)

CHAIR SHEEHAN: Abstain?

MEMBER SMITH: Abstain.

CHAIR SHEEHAN: All right. The minutes will reflects that the Controller abstains on that vote.

MS. HIGASHI: This brings us to Item 6. Mr. Feller will presently Item 6.

CHAIR SHEEHAN: Mr. Feller, do you want to present?

MR. FELLER: Sure. Unless there's objections, staff recommends that the Commission adopt the proposed Statement of Decision, which accurately reflects the decision on this test claim. Staff also recommends the Commission allow minor changes to be made to the Statement of Decision, including reflecting the hearing testimony and the vote count that will be included in the

final Statement of Decision.

CHAIR SHEEHAN: All right, so do we have a motion on the staff analysis recommendation?

MEMBER BOEL: I move that we adopt the staff analysis and recommendation.

MEMBER LUJANO: Second.

CHAIR SHEEHAN: We have a motion and a second.

All those in favor, signify by saying "aye."

(A chorus of "ayes" was heard.)

CHAIR SHEEHAN: Opposed?

(No audible response was heard.)

CHAIR SHEEHAN: Abstain?

MEMBER SMITH: Abstain.

CHAIR SHEEHAN: The Controller's office is abstaining.

And that motion carries.

I guess the only thing I would like to say to some of the Members is, I have a feeling it's not going to be the end of this issue for us. I would encourage discussion with the Legislature on this issue because I think, as the Controller's office represented, there are a lot of policy issues involved in this. And my guess is, we will see this again at some point.

All right, Item 7. Paula?

MS. HIGASHI: Could we take just a brief break?

REPORTER'S CERTIFICATE

I hereby certify that the foregoing proceedings were duly reported by me at the time and place herein specified;

That the testimony of said witnesses was reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said caption.

In witness whereof, I have hereunto set my hand on 18th of April 2005.

Daniel P. Feldhaus

DANIEL P. FELDHAUS
California CSR #6949
Registered Diplomate Reporter
Certified Realtime Reporter

Nancy Patton

From: Nancy Patton
Sent: Tuesday, April 05, 2005 3:54 PM
To: Alex Amoroso (E-mail); Allan Burdick (E-mail); Annette Chinn (E-mail); Betsy Strauss (E-mail); Brad Burgess (E-mail); Brian Annis (E-mail); Cathy Creswell (E-mail); Christine Minnehan (E-mail); City of El Monte (E-mail); D Lanferman; Dan Carrig (E-mail); Dan Rabovsky (E-mail); Dave O'Toole (E-mail); David Wellhouse; Eric Feller; Ginny Brummels (E-mail); Harriet Steiner; Jack Limber; Janet McBride; Jesse McGuinn (E-mail); Judy Nevis (E-mail); Julie Snyder (E-mail); Kenneth Moy (E-mail); Kim Dellinger (E-mail); Klint Johnson (E-mail); Leonard Kaye (E-mail); Linda Wheaton; Mark Stivers (E-mail); Matt Paulin (E-mail); Maureen Higgins (E-mail); Michael Cohen (E-mail); Pam Stone (E-mail 2); Patricia Chen; Patricia Jones (E-mail); Paula Higashi; Richard Friedman; Robert Smith (E-mail); Rusty Selix (E-mail); Susan Baldwin (E-mail); Susan Geanacou (E-mail); Tim Hall (E-mail)
Subject: Reconsideration: Regional Housing Needs Determination - Statements of Decision

Good afternoon,

The adopted Statements of Decision for both Regional Housing Needs Determination - Councils of Government and Cities and Counties have been uploaded to our website. You may find these documents at csm.ca.gov / Reconsiderations / Regional Housing Needs Determination - Councils of Government, and Regional Housing Needs Determination - Cities and Counties. Please contact me if you have questions.

thank you,
Nancy Patton
Assistant Executive Director
Commission on State Mandates
(916) 323-8217

Eric Feller

From: Chen, Patricia J. [pchen@fulbright.com]
Sent: Thursday, May 05, 2005 5:54 PM
To: Eric Feller
Subject: FW: Request for Reconsideration

Eric,

I tried to send you our scanned request for reconsideration but my email was bounced back because your mailbox is full. Please let me know when you would like me to try to send it again. You will still receive the hard copy via Fed Ex.

Pat

-----Original Message-----
From: Chen, Patricia J.
Sent: Thursday, May 05, 2005 5:25 PM
To: 'Eric Feller'
Cc: 'Kenneth Moy'; 'tachiki@scag.ca.gov'; Lennard, Colin
Subject: Request for Reconsideration

Eric,

Attached is SCAG's request for reconsideration. We have also Fed Exed a hard copy to you which you should receive tomorrow.

If you have any questions, please let me know.

Pat

Patricia J. Chen, Esq.
Fulbright & Jaworski L.L.P.
865 S. Figueroa
29th Floor
Los Angeles, CA 90017
ph: (213)892-9208
fax: (213)680-4518

EXHIBIT E

Insert airbill here

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Patricia J Chen
Fulbright & Jaworski L.L.P
865 South Figueroa Street
Twenty-Ninth Floor
Los Angeles, CA 90017

FedEx Express

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169

WAYNE L. FERDIG, Plaintiff and Appellant,
v.
STATE PERSONNEL BOARD et al., Defendant and Respondent.
Sac. No. 7823.

Supreme Court of California

May 8, 1969.

HEADNOTES

(1) Civil Service § 4.5--Veterans' Preferences.
A civil service applicant was not entitled to any veterans' preference credits under Gov. Code, § 18973, providing therefor and defining veteran, where his service in the merchant marine did not satisfy the statutory service requirement specified as essential for a veterans' preference.

Character of service or connection with military or naval service necessary to entitle one to benefit of veterans' preference statute in relation to civil service, note, 87 **A.L.R.** 1002. See also **Cal.Jur.2d,** Civil Service, § 14; **Am.Jur.2d,** Civil Service, § § 26, 27.

(2) Civil Service § 4.5--Veterans' Preferences.
In the context of civil service, authority to determine the allowance of veterans' preferences emanates from the California Constitution (Cal. Const., art. XXIV, § 7) and has been in turn conferred by the Legislature upon the Department of Veterans Affairs (Gov. Code, § 18976); the department is charged with the responsibility of notifying the State Personnel Board which candidates have qualified for veterans' preference and in carrying out this responsibility it must make its determination in accordance with the statute allowing additional credit to veterans (Gov. Code, § 18973), but the veteran has some responsibility in presenting proof of eligibility to the department (Gov. Code, § 18976).

(3a, 3b, 3c) Civil Service § 4.5--Veterans' Preferences.
The appointment of a state civil service applicant was void, and the State Personnel Board had jurisdiction to revoke it and to remove the appointee from ***97** his position, where his right to appointment was dependent on veterans' preference credits and the appointment had been made as a consequence of the applicant's erroneous representation to the Department of Veterans Affairs that he was a veteran when in fact he was not.

(4) Civil Service § 3--Constitutional and Statutory Provisions.
The action of the Department of Veterans' Affairs invoked by a request for veterans' preference credits is an integral part of the civil service system established by the People and implemented by the Legislature through the State Civil Service Act; the system is grounded on the constitutional mandate that permanent appointments and promotion in the state civil service shall be based upon merit, efficiency and fitness as ascertained by competitive examination; the Legislature has provided a detailed method of carrying out the constitutional mandate, so that appointments shall be based upon merit and fitness.

(5) Civil Service § 4.5--Veterans' Preferences.
Where a person on an eligible list claiming to be a veteran is not in fact a veteran, he is not entitled to receive veterans' preference credit, the Department of Veterans' Affairs is without power to certify that he is entitled, and the State Personnel Board is without power to allow such credits.

(6) Administrative Law § 37--Validity of Administrative Action--Compliance With Constitutional and Statutory Provisions.
Administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute; and an administrative agency must act within the powers conferred upon it by law and may not validly act in excess of such powers.

See **Cal.Jur.2d,** Administrative Law, § 63; **Am.Jur.2d,** Administrative Law, § 188.

(7) Civil Service § 1--State Personnel Board.
The State Personnel Board is a body of special and limited jurisdiction and has no powers except such as the law of its creation has given it.

(8) Civil Service § 3--Constitutional and Statutory Provisions.
The jurisdiction of the State Personnel Board, including its adjudicating power, is derived directly from Cal. Const., art. XXIV, § 3, which directs that the board shall administer and enforce the civil

service laws, and its authority is governed by the Constitution as well as by the Civil Service Act.

See **Cal.Jur.2d,** Civil Service, § 5.

(9) Civil Service § 12(2)--Discharge, Demotion, Suspension and Dismissal-- Hearing--State Personnel Board.
The State Personnel Board was ***98** within its power in entertaining a challenge to the legality of a civil service applicant's appointment, in holding a hearing and conducting an investigation on such complaint, and in rectifying the appointment which had been improperly and unlawfully, though in good faith, made based on unauthorized veterans' preference credits, where the board received the prompt and full cooperation of the Department of Veterans' Affairs which itself reexamined the applicant's eligibility for veterans' preference credits and removed them, where an objection was raised with the department only a month after the applicant's appointment, and an objection was made to the board approximately three months later, and where both agencies promptly reviewed the matter.

(10) Civil Service § 10--Discharge, Demotion, Suspension and Dismissal-- Grounds.
Gov. Code, § 19173, providing for rejection of probationers for certain deficiencies, was not intended to cure any defect in certification and appointment deriving from violation of the civil service statutes, and its provisions for rejection of a civil service appointee during a probationary period were inapposite, where the applicant's separation from a position to which he sought reinstatement was effectuated under the implied power of the State Personnel Board to rectify appointments made in violation of the civil service laws in appointing the applicant, who was qualified for the position in question by passing the examination, but not eligible to be certified for the position.

(11) Civil Service § 12(1)--Hearing--Time for Protest.
It was not necessary that a protestor of a civil service appointment file an "appeal" to the State Personnel Board within the time limits prescribed by its rules where the board, upon the matter being called to its attention, had jurisdiction to review and correct its initial action based on allowance of unauthorized veterans' preference credits by which a civil service applicant improperly secured eligibility for certification and appointment; and, in any event, the protest was timely made where 15 days thereafter the Department of Veterans' Affairs formally notified the personnel board that the applicant's veterans' preference had been "removed."

SUMMARY

APPEAL from a judgment of the Superior Court of Sacramento County. Mamoru Sakuma, Judge. Affirmed.

Proceeding in mandamus to compel the State Personnel Board to set aside its order revoking an appointment to a civil service position. Judgment denying writ affirmed.

COUNSEL

Walter W. Taylor for Plaintiff and Appellant. ***99**

Thomas C. Lynch, Attorney General, William M. Goode and Robert Burton, Deputy Attorneys General, and Harry T. Kaneko for Defendants and Respondents.

SULLIVAN, J.

This is an appeal from a judgment denying a writ of mandate to compel respondent State Personnel Board (Board) [FN1] to set aside and annul its order revoking the appointment of appellant Wayne L. Ferdig to a state civil service position, and to reinstate appellant in said position.

> FN1 Respondents named in the court below were the following: (a) The Board and members Joseph L. Wyatt, Jr., Robert S. Ash, May Layne Bonnell, Ford A. Chatters and Samuel Leask, Jr.; (b) Theodore J. Walas; Frederick Granberg and Murray J. Hunter, three individuals entitled to certification for the position involved on the alleged ground that appellant's certification was illegal; and (c) nine individuals ranking above appellant on the employment list on the alleged ground that the allowance of veterans' preference credits to appellant was illegal. The record discloses that only those named in (a) and (b) appeared in the court below. Respondents named in (a) have appeared in this court through the Attorney General; respondent Walas did not file a brief herein but appeared by counsel at oral argument; the other respondents have not appeared herein.

The facts are not in dispute and, as disclosed by the

trial court's findings and the documents in the record, are as follows: On May 14, 1962, appellant was appointed to the class of Refrigeration Engineman with no veterans' preference requested or applied to his score. On March 12, 1963, he was transferred to the class of Office Building Engineer.

On July 20, 1963, appellant took an examination for class of Chief Engineer II in the Department of General Services and the employment list established on October 1, 1963, ranked him as number 16. On October 17, 1963, he applied to the Department of Veterans Affairs (Department) for a veterans' preference, presenting a certificate of discharge. This document was issued by the United States Naval Service and certified in substance that appellant, described therein as "Apprentice Seaman, Class M-1" had been honorably discharged from said service. It indicates on its face appellant's service in the United States Naval Reserve, as distinguished from the United States Navy; another document in the record refers to appellant's service as "war-time service in the merchant marine." As a result of said presentation, the Department of Veterans Affairs notified the Board that veterans' preference points were applicable to appellant's score, thereby moving appellant up to number 4 on the list.

As a result of a waiver by a person ahead of him, appellant then became one of the top three on the list and thus eligible ***100** for appointment. On August 24, 1964, he was appointed to the position of Chief Engineer II. Without the addition of veterans' points, he would not have been within the top three on the list.

On September 25, 1964, the question was raised with the Department of Veterans Affairs as to whether the application of veterans' preference points to appellant's case was proper. The Department then requested appellant to resubmit the documents supporting his claim therefor. On November 9, 1964, approximately nine weeks after appellant's appointment to the position, the Department advised appellant that his application for the points had been approved erroneously. Appellant objected to this determination and the Departent directed an inquiry to the appropriate federal agency as to whether appellant's service and training in the Naval Service was considered active duty in the armed forces of the United States.

On January 4, 1965, an officer of Local 411 of the Union of State Employees, by letter to the Board, questioned the legality of appellant's appointment as Chief Engineer II. Shortly thereafter the Judge Advocate of the Department of the Navy advised the Department of Veterans affairs that appellant had performed no active duty or other active naval service. The latter Department thereupon notified both appellant and the Board that it had removed appellant's veterans' preference. On April 9, 1965, the Board, after a hearing, made its order revoking appellant's appointment "from the beginning."

The trial court, concluding that the Board had acted lawfully, denied appellant's petition for a peremptory writ of mandate and discharged the alternative writ theretofore issued. This appeal followed.

Appellant makes no claim before us that he is, or ever was, a veteran as that term is used in Government Code section 18973 [FN2] which provides for additional credits for veterans attaining passing marks in specified examinations. Essentially he advances two contentions: First, that the jurisdiction of the Board to remove civil service employees is expressly limited by statute and appellant's removal was not authorized by any statute; and second, that although the Board's action in crediting him with veterans' preference points was erroneous, ***101** it had nevertheless become final and the Board was without jurisdiction to reconsider or correct it.

> FN2 Hereafter, unless otherwise indicated, all section references are to the Government Code.

We turn first to the circumstances of appellant's appointment. The record before us establishes without any contradiction that appellant was not entitled at any time to the veterans preference points which advanced him from number 16 to number 4 and eventually to number 3 on the list, and thereby made him eligible for appointment.

(1) Section 18973 at the times here material provided that in certain examinations "a veteran with 30 days or more of service" who becomes "eligible for certification from eligible lists by attaining the passing mark established for the examination" shall be allowed specified additional points. The statute further provided: "For the purpose of this section, 'veteran' means any person who has served full time for 30 days or more in the armed forces in time of war or in time of peace in a campaign or expedition for service in which a medal has been authorized by the Government of the United States, or during the period September 16, 1940, to December 6, 1941,

inclusive, or during the period June 27, 1950, to January 31, 1955, and who has been discharged or released under conditions other than dishonorable, ..." [FN3]

FN3 Section 18973 underwent minor revisions in 1967 and 1968 which are not material in the present case.

(2) Appellant was not a "veteran" within the meaning of the above statute. His service in the merchant marine did not satisfy the statutory service requirements specified as essential for a veterans' preference. The plain fact of the matter is that appellant was not entitled to any veterans' preference credits. Indeed, appellant himself seems to concede all this.

Authority to determine the allowance of veterans' preferences emanates from the California Constitution [FN4] and has been in turn conferred by the Legislature upon the Department of Veterans Affairs. (§ 18976.) [FN5] The Department is thus ***102** charged with the responsibility of notifying the State Personnel Board which candidates have qualified for veterans' preference. We think it is clear that in carrying out this responsibility the Department must make its determination in accordance with the statute allowing the additional credits. (§ 18973; see fn. 3, *ante*.)

FN4 Section 7 (entitled "Veterans' Preferences") of article XXIV (entitled "State Civil Service") of the California Constitution provides: "Nothing herein contained shall prevent or modify the giving of preferences in appointments and promotions in the State civil service to veterans and widows of veterans as is now or hereafter may be authorized by the Legislature."

FN5 Section 18976 provides: "Request for and proof of eligibility for veterans' preference credits shall be submitted by the veteran to the Department of Veterans Affairs. The procedures and time of filing such request shall be subject to rules promulgated by the Department of Veterans Affairs. After the State Personnel Board certifies that all parts of an examination have been completed and the relative standings of candidates are ready to be computed the Department of Veterans Affairs shall notify the State Personnel Board which candidates have qualified for veteran preference credits on the examination."

But the veteran himself has some responsibility in these matters. Under section 18976: "Request for and *proof of eligibility for veterans' preference credits* shall be submitted *by the veteran* to the Department of Veterans' Affairs." (§ 18976). (Italics added.) In the instant case, appellant's application for veterans' preference made on an official form of the Department is before us. At the top of the document in large bold type appears the following: "Instructions and Eligibility Requirements Are Listed on the Back of This Application." The reverse of the document contains, among other things, an explicit statement of the eligibility requirements in accordance with the language of section 18973. [FN6] Immediately above appellant's signature on the face of the application appears the following: "Signature: I Hereby Certify that I am eligible for veterans' preference and that the statements on this application are true, and I agree and understand that any misrepresentation of material facts herein may cause forfeiture of all right to any employment in the service of the State of California."

FN6 For example the first sentence reads in pertinent part as follows: "Only veterans with active service in the *armed forces* of the United States *in time of war,* or in time of peace in a campaign or expedition for service in which a medal has been authorized by the Government of the United States ... may receive a 10-point preference on State of California civil service examination ...." (Italics added.)

(3a) In sum, not only was the allowance of a veteran's preference to appellant unauthorized because he was at no time a veteran; it was also made as a consequence of appellant's erroneous representation to the Department that he was a veteran, when in fact he was not. Although appellant's representation may have been made in good faith and the Department's action may be characterized as a mistake, nevertheless the fact remains that the Department notified the Board that appellant was a candidate who qualified for veterans' preference credits on the examination (§ 18976) when in fact he did not.

(4) The action of the Department which appellant invoked by his request for veterans' preference credits was an integral ***103** part of the civil service system established by the people (Cal. Const., art. XXIV; see

Boren v. State Personnel Board (1951) 37 Cal.2d 634, 639 [234 P.2d 981]) and implemented by the Legislature through the State Civil Service Act (Act) (§ § 18500-19765). This system is grounded upon the constitutional mandate that permanent appointments and promotion in the state civil service shall be "based upon merit, efficiency and fitness as ascertained by competitive examination." (Cal. Const., art. XXIV, § 1; see Gov. Code, § § 18500, 18930, 18950). The Act provides a detailed method of carrying out this mandate (§ 18500, subds. (a) and (c)) so that among other objectives, appointments shall be based upon merit and fitness (§ 18500, subd. (c) (2)) and state civil service employment can be made a career. (§ 18500, subd. (c) (3).) It is manifest from an examination of the Act that the Legislature has taken great pains to prescribe exactly how appointment to state civil service positions is to be made. (See for example § § 18532, 18900, 18950, 19052.) This finds emphatic confirmation in section 19050: "The appointing power in all cases not excepted or exempted by virtue of the provisions of Article XXIV of the Constitution shall fill positions by appointment, including cases of transfers, reinstatements, promotions and demotions, in strict accordance with this part and the rules prescribed from time to time hereunder, *and not otherwise.* Except as provided in this part, appointments to vacant positions shall be made from employment lists." (Italics added.)

(5) Viewing in this context the provisions of the Act dealing with veterans' preferences, we have no hesitancy in concluding that where, as in the instant case, a person on an eligible list claiming to be a veteran is not in fact a veteran, he is not entitled to receive veterans' preference credits, the Department of Veterans Affairs is without power to certify that he is entitled, and the State Personnel Board is without power to allow such credits.

(6) It is settled principle that administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute. (*United States Fid. & Guar. Co. v. Superior Court* (1931) 214 Cal. 468, 471 [6 P.2d 243]; *Pacific Employers Ins. Co. v. French* (1931) 212 Cal. 139, 141-142 [298 P. 23]; *Grigsby v. King* (1927) 202 Cal. 299, 304 [260 P. 789]; *Garvin v. Chambers* (1924) 195 Cal. 212, 220- 223 [232 P. 696]; *Motor Transit Co. v. Railroad Com.* (1922) 189 Cal. 573, 577 [209 P. 586]; see ***104***Pacific Tel. & Tel. Co. v. Public Utilities Com.* (1950) 34 Cal.2d 822 [215 P.2d 441]; *State Comp. Ins. Fund v. Industrial Acc. Com.* (1942) 20 Cal.2d 264, 266 [125 P.2d 42]; *Allen v. McKinley* (1941) 18 Cal.2d 697, 705 [117 P.2d 342]; 1 Am.Jur.2d Administrative Law, § 70, p. 866.) An administrative agency, therefore, must act within the powers conferred upon it by law and may not validly act in excess of such powers. (See cases cited immediately above; see 2 Am.Jur.2d, Administrative Law, § 188, pp. 21-22.) (3b) In accordance with these principles, it has been held in this state, in matters pertaining to civil service and in other contexts, that when an administrative agency acts in excess of, or in violation, of the powers conferred upon it, its action thus taken is void. (See *Aylward v. State Board of Chiropractic Examiners* (1948) 31 Cal.2d 833, 839 [192 P.2d 929]; *Patten v. California State Personnel Board* (1951) 106 Cal.App.2d 168, 172-175 [234 P.2d 987]; *Pinion v. State Personnel Board* (1938) 29 Cal.App.2d 314, 319 [84 P.2d 185]; *Campbell v. City of Los Angeles* (1941) 47 Cal.App.2d 310, 313 [117 P.2d 901].) To hold otherwise in the case before us would be to frustrate the purpose of the civil service system.

Having concluded that appellant was not entitled to the appointment in the first place and that his appointment was void, we proceed to determine whether the Board had jurisdiction to revoke his appointment "from the beginning" and to remove him from his position. As we have already pointed out, appellant attacks such action on two broad grounds: First, he argues, the jurisdiction of the Board is expressly limited by statute and no statute authorizes his removal; secondly, since at the time of his removal he had already performed efficient service for more than the six months' probationary period, he had become a permanent employee and his appointment had become final.

Appellant's first argument is launched from section 19500 [FN7] which deals with the tenure of permanent employees and their separation from state civil service. The gist of the argument is that none of the methods of separation delineated in section 19500 apply in the instant case, and that since the Legislature ***105** has designated these methods of separation, it has of necessity excluded all others. The argument is misconceived and indeed ignores the circumstances of the problem before us. We are obviously not dealing with any of the situations covered by section 19500; nor are we dealing with a removal for cause based on any of the causes for discipline specified in section 19572.

FN7 Section 19500 provides: "The tenure of every permanent employee holding a position is during good behavior. Any such

> employee may be temporarily separated from the State civil service through layoff, leave of absence, or suspension, permanently separated through resignation or removal for cause, or permanently or temporarily separated through retirement *or terminated for medical reasons under the provisions of Section 19253.5."*
> Section 19253.5 makes provision for a medical examination of an employee for purposes of evaluating his capacity to perform his duties.

What we examine here is the jurisdiction of the Board to take corrective action with respect to an appointment which it lacked authority to make. It defies logic to say that the mere enumeration in the Act of the methods of separating an employee from state civil service in a situation where an appointment has been validly made, compels the conclusion that no jurisdiction exists to rectify the action of the Board in a situation where an appointment has been made without authority.

(7) It is true, as appellant argues, that the "State Personnel Board is a body of special and limited jurisdiction [and] ... has no powers except such as the law of its creation has given it." (*Conover v. Board of Equalization* (1941) 44 Cal.App.2d 283, 287 [112 P.2d 341].) (8) But article XXIV, section 3 of the California Constitution directs that the Board "shall administer and enforce" the civil service laws. The jurisdiction of the Board, including its adjudicating power is derived directly from this section. (*Boren v. State Personnel Board, supra,* 37 Cal.2d 634, 637-638; *Neely v. California State Personnel Board* (1965) 237 Cal.App.2d 487, 488-489 [47 Cal.Rptr. 64]) and the Board's authority is governed by the Constitution as well as by the Civil Service Act. (*Boren v. State Personnel Board, supra,* 37 Cal.2d 634, 640- 641.)

Additionally we note that the Act provides in section 18670: "The board may hold hearings and make investigations *concerning all matters relating to the enforcement and effect of this part* and rules prescribed hereunder. It may inspect any State institution, office, or other place of employment affected by this part to *ascertain whether this part and the board rules are obeyed.*

"The board shall make investigations and hold hearings at the direction of the Governor or the Legislature or upon the petition of an employee or a citizen *concerning the enforcement and effect of this part and to enforce the observance of the provisions of Article XXIV of the Constitution and of this part* and the rules made hereunder." (Italics added.)

The provisions of the Constitution and of the Act to which ***106** we have just referred, considered in the light of the purpose, objective and entire scheme of the civil service system, convince us that in the matter here under review the Board was invested with the power, and, indeed, charged with the duty, to "administer and enforce" the applicable sections dealing with veterans' preference credits. (§ § 18973, 18976; see text accompanying fn. 3, *ante*; see fn. 5, *ante.*) Thus, after having been notified by the Department of Veterans Affairs which candidates had qualified for veterans' preference credits (§ 18976), it was the duty of the Board to apply such credit (§ 18974) and eventually to certify the three highest names on the eligible list to the appointing power. (§ 19057.) Essentially and in the final analysis, it was the Board which was charged with the responsibility of coordinating all of the procedures of the Act to the end of certifying only those persons who were lawfully entitled to the position. [FN8] In this constitutional and legislative scheme, a determination made by the Department contrary to the provisions of the Act, albeit in good faith, as to qualification for veterans' preference credits could not be conclusive upon the Board. If this were so, the Board's power to administer and enforce the Act would be eroded and that body would be compelled to certify for appointment persons who were in fact not entitled to the position.

> FN8 We emphasize that the determination of eligibility for veterans' preference credits is only one step in a procedure designed to have promotions and appointments based upon merit, efficiency and fitness. To accomplish this objective, the Board is charged, inter alia, with the responsibility of administering competitive examinations (§ 18930), setting passing grades (§ 18937), determining each competitor's earned rating (§ 18936), modifying these ratings by applying veterans' preference points (§ 18974), preparing eligible lists of those persons who may be lawfully appointed to any position within the class for which the examination is held (§ 18900), and certifying the three highest names to the appointing power. (§ 19057.)

(3c) We conclude, therefore, that when the matter was brought to its attention, the Board had

jurisdiction to inquire into and review the certification as to veterans' preference credits made by the Department of Veterans Affairs and having determined that appellant was not entitled to such credits, to take the corrective action which it did by revoking appellant's appointment. While this jurisdiction does not appear to have been conferred upon the Board in so many words by the express or precise language of constitutional or statutory provision, there can be no question that it is implicit in the constitutional and statutory scheme which empowers the Board to administer and enforce the civil service laws. ***107**

(9) We are satisfied that the Board was well within its power in entertaining the challenge made to the legality of appellant's appointment, in holding a hearing and conducting an investigation on such complaint, and in rectifying the appointment which had been improperly and unlawfully made, although made in good faith. In this, as we have already pointed out, the Board apparently received the prompt and full cooperation of the Department of Veterans Affairs which itself reexamined appellant's eligibility for veterans' preference credits and removed the preference. In the light of this background-an objection raised with the Department only a month after appellant's appointment, an objection made to the Board approximately three months later, and the prompt review of the matter by both agencies-appellant's insistent claim to an appointment to which he was not entitled in the first place, is exposed as utterly groundless. We can apprehend neither reason nor fairness in the position of appellant, who seemingly acknowledges that he was at no time a veteran within the terms of the statute but nevertheless insists that he should be permitted to retain the veteran's benefits to which he was never entitled.

We therefore reject appellant's arguments, first, that the Board having once made a good faith determination as to appellant's position on the list and having acted upon it, had no reserved power to annul its action; and second, that the appointment having once been accepted in good faith by appellant who performed efficiently in the position for the probationary period, could not be thereafter revoked by the Board.

As to the first argument, we have already explained why the Board had jurisdiction to review the matter and to take the corrective action it did. Our conclusions on this point are consistent with California precedents. In the cases already cited exemplifying the principle that appointments in violation of the civil service laws are void, it was recognized that the appropriate board had jurisdiction to correct the unlawful action taken. In *Campbell v. City of Los Angeles, supra,* 47 Cal.App.2d 310, mandate was denied to compel reinstatement of a civil service employee who had been reappointed after having been illegally restored to the eligibility list by the civil service commission and was subsequently discharged on the ground that since his restoration to the list was illegal, his appointment was illegal. Although the discharge seems to have been initially made by the department head, it was ***108** passed upon and sustained by the civil service commission. In *Pinion v. State Personnel Board, supra,* 29 Cal.App.2d 314, the court denied mandate to compel the Board to recognize the petitioners, who had permanent status under civil service, as properly holding certain civil service positions although they had been actually certified for only a class of junior positions. It was there said: "The only positions lawfully held by these petitioners are those for which they were examined and to which they were certified and appointed in the manner provided by law." (29 Cal.App.2d at p. 318.) In *Aylward v. State Board of Chiropractic Examiners, supra,* 31 Cal.2d 833, 839, we said: "Implicit in the cases denying a board's power to review or reexamine a question, however, is the qualification that the board must have acted within its jurisdiction and within the powers conferred on it. Where a board's order is not based upon a determination of fact, but upon an erroneous conclusion of law, and is without the board's authority, the order is clearly void and hence subject to collateral attack, and there is no good reason for holding the order binding on the board. Not only will a court refuse to grant mandate to enforce a void order of such a board [citations], but mandate will lie to compel the board to nullify or rescind its void acts. [Citation.] While a board may have exhausted its power to act when it has proceeded within its powers, it cannot be said to have exhausted its power by doing an act which it had no power to do or by making a determination without sufficient evidence. In such a case, the power to act legally has not been exercised, the doing of the void act is a nullity, and the board still has unexercised power to proceed within its jurisdiction." [FN9]

FN9 Strangely enough, appellant while challenging the jurisdiction of the Board to take corrective action in the case before us, appears to recognize the inherent inequity of his position and goes out of his way to inform us that he is *not* arguing that a court,

> rather than the Board, "could not ... have removed [him] from his position pursuant to its general equity jurisdiction."

(10) Appellant's second argument, namely, that his appointment could not be revoked after the expiration of a six months' probationary period, is also without merit. Section 19173 provides: "Any probationer may be rejected by the appointing power during the probationary period for reasons relating to the probationer's qualifications, the good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility. ..." Here, appellant was qualified for the position in question because he passed the examination, but he was not eligible to be certified for it; it is not disputed that he ***109** performed satisfactorily up to the time of his dismissal. Therefore, none of the grounds provided in section 19173 were available to the appointing power (Department of General Services) or the Board to dismiss appellant during his probationary period. Nor was section 19173 intended to cure any defect in certification and appointment deriving from violation of the civil service statutes. Appellant's separation from the position to which he now seeks reinstatement was effectuated under the implied power of the Board to rectify appointments made in violation of the civil service laws. For this reason, provisions for rejection during the probationary period are inapposite here.

It is convenient at this point to observe that *after* the occurrence of the events here involved and *after* the decision of the Court of Appeal in this case, the Legislature at its 1968 regular session enacted Government Code section 19257.5 which provides: "Where the appointment of an employee has been made and accepted in good faith, but where such appointment would not have been made but for some mistake of law or fact which if known to the parties would have rendered the appointment unlawful when made, the board may declare the appointment void from the beginning *if such action is taken within one year after the appointment.*" (Italics added.) (Added by Stats. 1968, ch. 500, § 1; in effect November 13, 1968.) The above section is of course not applicable to the case at bench. We wish to make clear, nevertheless, that our views and holdings in the instant case apply to a situation arising before the enactment of the statute and should not be deemed as derogating from, or otherwise affecting the proper operative effect of, the above statute, particularly the last clause thereof.

(11) Finally, appellant contends that the Board by its own rules was divested of jurisdiction "to accept the appeal" or to take action on April 9, 1965. The point of this argument is that appellant's appointment was made on August 24, 1964. and under the Board's rule 64 "every appeal shall be filed with the board ... within 30 days after the event happened upon which the appeal is based. Upon good cause being shown the board ... may allow such an appeal to be filed within 30 days after the end of the period in which the appeal should have been filed." Therefore, argues appellant, the protest made by the officer of the union on January 4, 1965, was an untimely appeal.

There are two answers. Assuming, that the above rules ***110** governed, we think that any "appeal" to the Board was timely made after the Department of Veterans Affairs on January 19, 1965, formally notified the Board that appellant's veterans' preference had been "removed." Second, and more importantly, we do not believe that it was necesary to file an "appeal" to the Board, which, upon the matter being called to its attention, clearly had jurisdiction to review and correct the initial action taken.

The judgment is affirmed.

Traynor, C. J., McComb, J., Peters, J., Tobriner, J., Mosk, J., and Burke, J., concurred.

Cal.,1969.

Ferdig v. State Personnel Bd.

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H

TIMOTHY FUKUDA, Plaintiff and Appellant,
v.
CITY OF ANGELS, Defendant and Appellant.
No. S071467.

Supreme Court of California

June 21, 1999.

SUMMARY

In administrative mandamus proceedings (Code Civ. Proc., § 1094.5) filed by a discharged police officer against a city, the trial court found that the evidence did not support the findings on which plaintiff's dismissal was based and entered a judgment barring plaintiff's termination. (Superior Court of Calaveras County, No. 19480, Richard E. Tuttle, Judge. [FN*]) The Court of Appeal, Third Dist., No. C018274, affirmed.

> FN* Retired judge of the Sacramento Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The Supreme Court reversed the judgment of the Court of Appeal with directions to remand the matter to the trial court for further proceedings. The court held that the trial court erred in ruling that when exercising independent judgment in administrative mandamus proceedings, a trial court may not afford the agency's findings any presumption of correctness and must place the burden of proof on the entity supporting the administrative agency's decision. Rather, in exercising its independent judgment, a trial court must afford a strong presumption of correctness to the administrative findings, and the party challenging the administrative decision bears the burden of convincing the trial court that the administrative findings are contrary to the weight of the evidence. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings. The court also held that the burden imposed on the party challenging the administrative decision is a burden of proof (Evid. Code, § 115) and not merely a burden of producing evidence (Evid. Code, § 110). Finally, the court held that in view of the long-standing duration of the judicial precedent establishing and reaffirming independent judgment review, and the legislative history of Code Civ. Proc., § 1094.5, which implicitly recognizes the rule, it would be inappropriate to judicially abrogate the independent judgment rule at this point, and that the policy arguments advanced in support of such a change properly should be directed to the Legislature. (Opinion by George, C. J., expressing the unanimous view of the court.) ***806**

HEADNOTES

Classified to California Digest of Official Reports

(1) Administrative Law § 99--Judicial Review and Relief--Administrative Mandamus--Construction of Statute.
Code Civ. Proc., § 1094.5, is a codification of the procedure the Supreme Court devised for reviewing the adjudications of administrative agencies, and the scope of review under the statute is the same as that specified in the Supreme Court's opinions. The Judicial Council's 1944 biennial report is valuable in ascertaining the meaning of the statute. The council drafted the statute at the Legislature's request and in this respect was a special legislative committee. As part of its report containing the proposed legislation, the Judicial Council told the Legislature what it intended by the language used. In the absence of compelling language in the statute to the contrary, it is assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report.

(2) Administrative Law § 111--Judicial Review and Relief--Administrative Mandamus--Scope and Extent of Review--Independent Judgment--Presumption as to Administrative Findings.
In administrative mandamus proceedings (Code Civ. Proc., § 1094.5) filed by a discharged police officer against a city, the trial court erred in ruling that when exercising independent judgment a trial court may not afford the agency's findings any presumption of correctness and must place the burden of proof on the entity supporting the administrative agency's decision. On the contrary, in exercising its independent judgment, a trial court must afford a strong presumption of correctness to the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence. The

presumption provides the trial court with a starting point for review-but it is only a presumption, and it may be overcome. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings.

[See 9 Witkin, Cal. Procedure (4th ed. 1997) Administrative Proceedings, § 112.]

(3) Administrative Law § 108--Judicial Review and Relief--Administrative Mandamus--Burden of Proof.
In administrative mandamus proceedings (Code Civ. Proc., § 1094.5), in which the trial court exercises its independent judgment, the party challenging the administrative ***807** decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence. That rule imposes a burden of proof (Evid. Code, § 115) and not merely a burden of producing evidence (Evid. Code, § 110). The legislative history of Code Civ. Proc., § 1094.5, demonstrates that the Legislature intended that statute to embrace the traditional allocation of the burden of proof contained in Evid. Code, § 500.

(4) Administrative Law § 131--Judicial Review and Relief--Substantial Evidence Rule.
Even when the trial court is required to review an administrative decision under the independent judgment standard of review, the standard of review on appeal of the trial court's determination is the substantial evidence test.

(5) Administrative Law § 138--Decision of Courts on Review and Subsequent Proceedings.
On appeal from an administrative mandamus proceeding (Code Civ. Proc., § 1094.5) brought by a discharged police officer, in which the trial court erroneously ruled that when exercising independent judgment a trial court may not afford the agency's findings any presumption of correctness and must place the burden of proof on the entity supporting the administrative agency's decision, the reviewing court could not properly review the trial court's findings and decision for substantial evidence, because the trial court's findings were themselves infected by its fundamental error. Accordingly, a remand to the trial court for further proceedings was the appropriate disposition.

COUNSEL

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GEORGE, C. J.

We granted review to address two important questions of administrative law arising in instances in which a trial court is required to exercise " independent judgment" review of an agency determination. First, in exercising such review, must a trial court afford a "strong presumption" that the administrative findings are correct? Second, does the petitioner seeking a writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5 bear the burden of proving that these findings are incorrect?

The Court of Appeal answered both questions in the negative, reasoning that presuming the correctness of administrative findings and placing the burden of proof on the petitioner would be incompatible with independent judgment review. We conclude that the Court of Appeal was in error, and that the judgment of the Court of Appeal must be reversed. As we shall explain, long-established case law demonstrates that neither presuming the correctness of administrative findings, nor placing the burden on the petitioner, is inconsistent with independent judgment review as

that term has been understood in this state.

After we accepted review in this matter, we granted the requests of a number of amici curiae to file briefs addressing, among other things, whether this court should continue to apply-or should abrogate-the independent judgment rule. As explained below, in view of the long-standing duration of the judicial precedent establishing and reaffirming independent judgment review, and the legislative history of Code of Civil Procedure section 1094.5, which implicitly recognizes the rule, we conclude that it would be inappropriate to judicially abrogate the independent judgment rule at this point, and that the policy arguments advanced in support of such a change properly should be directed to the Legislature. ***809**

I

This matter commenced as a disciplinary proceeding against Timothy Fukuda, a veteran police officer of the City of Angels (City), [FN1] based upon his conduct during and following the chase and apprehension of a reckless and erratic driver of a vehicle around midnight sometime in mid-August 1992.

> FN1 The City of Angels is comprised of Angels Camp and Altaville.

The police department's internal affairs unit investigated Fukuda's conduct, and in mid-November 1992, after Fukuda had waived a "pre-disciplinary meeting, " Police Chief John Bart advised Fukuda in writing that he was dismissed from the police department. Chief Bart asserted that Fukuda's conduct during the chase-which included driving in the opposite direction of traffic, engaging in a "rolling roadblock" [FN2] in violation of department policy, and very nearly being rammed by the suspect's automobile-had been unreasonably dangerous, and that Fukuda, in his written report and in his interviews with the department's internal affairs unit, had lied about his conduct.

> FN2 A rolling roadblock occurs when an officer slows his or her vehicle to a near stop in an effort to block the forward progress of a following vehicle.

Pursuant to the City's "Memorandum of Understanding" with the police officers' association, Fukuda exercised his right to "appeal" the termination. The city council designated a hearing officer who was "not ... from the office of the City Attorney," who had been "licensed [and] ... admitted to practice in this State for at least 10 years," and who was a "member of the American Arbitration Association." (Mem. of Understanding, art. XIV, § 14.03.) There followed a seven-day transcribed hearing held in accordance with Government Code sections 11507.6 and 11513 (setting out rules for discovery and evidence), at which Fukuda and numerous other witnesses testified and at which voluminous evidence was received. The hearing officer rendered a written recommendation concerning the "appropriate disposition of the case." (See Mem. of Understanding, art. XIV, § 14.04.) The recommendation (i) adopted the nine written findings of Chief Bart, (ii) rejected as unsupported by the evidence Fukuda's assertion that the termination decision was motivated by retaliation against him for having engaged in union activities, and (iii) sustained the termination recommendation.

Two of the findings addressed Fukuda's conduct during the pursuit: first, that he engaged in a pursuit outside the City, in conjunction with allied agencies, without being requested or authorized to do so; and second, that Fukuda engaged in a rolling roadblock in violation of department policy. The remaining findings addressed Fukuda's conduct after the pursuit: that he ***810** misrepresented the facts in his report on the incident and lied to investigators after the incident.

Thereafter, in accordance with the Memorandum of Understanding, the hearing officer's findings were forwarded to the city council. After consideration, the city council followed the recommendation of the hearing officer and dismissed Fukuda.

Fukuda sought a writ of administrative mandamus to challenge the action of the city council. (Code Civ. Proc., § 1094.5; hereafter section 1094.5.) The trial court, observing that Fukuda's "right to continued employment is a fundamental right," stated that *the City* "must therefore establish that the weight of the evidence supports the findings. This means that [the City] has the burden of proof to produce a preponderance of evidence in support of the findings." [FN3] Discounting the evidence upon which the hearing officer and the city council had relied, the trial court concluded that in most respects the City had "failed to establish" the various findings against Fukuda. The court found that Fukuda had engaged in a prohibited roadblock, but also concluded that the city council abused its discretion by imposing the penalty of termination. At the same time, the trial court also rejected Fukuda's assertion that the proceedings were instituted against him in

retaliation for his union activities. As noted, the Court of Appeal affirmed, rejecting the City's assertion that the superior court erred by placing the burden of proof on the City.

> FN3 The trial court also stated: "[Fukuda], however, has the burden of proof with respect to the assertion that he was wrongfully discharged because of his union activity since this is in the nature of an affirmative defense."

II

Section 1094.5 sets out the procedure for obtaining judicial review of a final administrative determination by writ of mandate. Two subdivisions of section 1094.5 are relevant here. Subdivision (b) provides that "[t]he inquiry in such a case shall extend to the questions whether the [agency] proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the [agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

Subdivision (c) of section 1094.5 provides in full: "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the ***811** evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

Section 1094.5 does not, on its face, specify which cases are subject to independent judgment review. Nor does it expressly allocate the burden of proof or articulate any presumption concerning the correctness of administrative findings in cases in which a trial court exercises independent judgment review. As explained below, however, each of those issues was squarely resolved by case law that preceded the enactment of section 1094.5 in 1945, and each has been reaffirmed repeatedly by subsequent case law that has governed the application of section 1094.5 for the past half century.

A

In the mid-1930's this court held that the determinations of state administrative agencies are not judicially reviewable by writ of certiorari or prohibition (*Standard Oil Co. v. State Board of Equal.* (1936) 6 Cal.2d 557 [59 P.2d 119]; *Whitten v. California State Board, Etc.* (1937) 8 Cal.2d 444 [65 P.2d 1296, 115 A.L.R. 1]), but instead are reviewable by writ of mandamus (often denominated writ of mandate; see Code Civ. Proc., § 1084). (*Drummey v. State Bd. of Funeral Directors* (1939) 13 Cal.2d 75 [87 P.2d 848] (*Drummey*).) The issues presented by this case have their origin in the *Drummey* decision.

In *Drummey*, *supra*, 13 Cal.2d 75, a statewide administrative board, after a hearing, suspended the petitioner's embalming license for one year. Upon the petitioner's request, the trial court issued first an alternative writ and then a peremptory writ of mandate commanding the board to dismiss the proceedings and restore the petitioner's license. On review of the appeal filed by the administrative board, we affirmed. We first explained that review by writ of mandate is the appropriate mode of review in such matters. (*Id.* at p. 84.) We then addressed "the question as to what weight the courts should give to the findings of the board-or, stated another way, are the findings of the board, if based on substantial although conflicting evidence, binding on the courts in the *mandamus* proceeding, as they would be in a *certiorari* proceeding or on an appeal?" (*Ibid.*, italics in original.)

We concluded that when a court reviews an administrative determination such as the one at issue, suspending a professional license, the court must "exercise its independent judgment on the facts, as well as on the law ...." (*Drummey*, *supra*, 13 Cal.2d at p. 84.) We also defined the extent of ***812** " independent judgment" review, explaining that such review "does not mean that the preliminary work performed by the administrative board in sifting the evidence and in making its findings is wasted effort.... [I]n weighing the evidence the courts can and should be assisted by the findings of the board. *The findings of the board come before the court with a strong presumption of their correctness, and the burden rests on the complaining party to convince the court that the board's decision is contrary to the weight of the evidence.* " (*Id.* at p. 85, italics added.)

Our opinion in *Drummey* immediately thereafter characterized the above quoted allocation of the burden of proof and presumption of correctness as " sound" "limitations on the rule that the court must exercise its independent judgment." (*Drummey*, *supra*, 13 Cal.2d at p. 86.) We reiterated and explained: "The findings of a board where formal

hearings are held should and do come before the courts with a strong presumption in their favor based primarily on the [rebuttable] presumption contained in section 1963, subsection 15, of the Code of Civil Procedure [currently Evidence Code section 664] 'That official duty has been regularly performed.' Obviously, considerable weight should be given to the findings of experienced administrative bodies made after a full and formal hearing, especially in cases involving technical and scientific evidence." (*Ibid.*)

Applying these principles to the matter then before us in *Drummey*, we reviewed the superior court's judgment "ordering the issuance of a peremptory writ commanding the board to reinstate" the petitioner's license. (*Drummey*, *supra*, 13 Cal.2d at p. 86.) We observed that findings by the trial court had been waived, and that "[i]t must be conclusively presumed on this appeal that *the trial court weighed the evidence giving due weight to the presumption in favor of the board's findings, but nevertheless, exercising its independent judgment, found against the board.*" (*Ibid.*, italics added.) We concluded that the trial court's judgment "must be affirmed" because it was, in turn, supported by substantial evidence in the record. (*Ibid.*) We restated this analysis at the close of the opinion: "Under such circumstances, the trial court having power to weigh the evidence, we must conclusively presume that the trial court *performed its duty, gave full weight to the presumption of validity of the board's findings, but nevertheless found against the board on this count.* The determination of the trial court on conflicting evidence on the facts is binding on this court on this appeal." (*Drummey*, *supra*, 13 Cal.2d at p. 88, italics added.)

Three years after *Drummey*, we decided *Laisne v. Cal. St. Bd. of Optometry* (1942) 19 Cal.2d 831 [123 P.2d 457] (*Laisne*), in which we stated that on mandamus review in the trial court, a petitioner challenging a statewide ***813** administrative board's revocation of his certificate of registration to practice optometry was entitled to independent judgment review, which we characterized as a "trial de novo." (*Id.* at p. 845.) [FN4] A few months thereafter we clarified that the "substantial evidence" standard of review, and not independent judgment review, was the proper standard for judicial review of the determination of local, as contrasted with statewide, agencies. (*Walker v. City of San Gabriel* (1942) 20 Cal.2d 879 [129 P.2d 349, 142 A.L.R. 1383] (*Walker*).) [FN5]

FN4 A vigorous dissent by Chief Justice Gibson, joined by Justices Edmonds and Traynor, asserted that this standard of review was unwarranted and unwise, and that review should be by certiorari, not mandate. (19 Cal.2d at pp. 848-869.)

FN5 A few years thereafter, we further clarified that the "substantial evidence" standard of review, and not independent judgment review, was the proper standard for judicial review of the determination of agencies authorized by the California Constitution to exercise "powers of a judicial nature." (*Covert v. State Board of Equalization* (1946) 29 Cal.2d 125, 131-132 [173 P.2d 545].)
As noted below, more than three decades after *Walker*, we overruled *Walker* and other decisions and extended the applicability of independent judgment review to the final determinations of local agencies as well as statewide agencies. (*Strumsky v. San Diego County Employees Retirement Association* (1974) 11 Cal.3d 28 [112 Cal.Rptr. 805, 520 P.2d 29] (*Strumsky*).)

At the General Election in 1942, a proposed constitutional amendment (Proposition 16), drafted and supported by individuals critical of this court's decisions in *Drummey* and *Laisne*, was placed before the voters. That proposition would have authorized the Legislature or any chartered city (or city and county) to enact legislation providing that the determinations of administrative agencies would be subject to judicial review under only the " substantial evidence" standard of review instead of the broader "independent judgment" review provided for in this court's recently decided precedents. (See Ballot Pamp., Proposed Amend. to Cal. Const., with arguments to voters, Gen. Elec. (Nov. 3, 1942) p. 23 [Appen.]; see also *id.* at p. 20 et seq.) The proposition was overwhelmingly rejected by the electorate.

Thereafter, in *Dare v. Bd. of Medical Examiners* (1943) 21 Cal.2d 790 [136 P.2d 304] (*Dare*), we again turned our attention to the independent judgment standard of review, affirming a statewide board's revocation of the petitioner's license and, in the process, clarifying aspects of both *Drummey*, *supra*, 13 Cal.2d 75, and *Laisne*, *supra*, 19 Cal.2d 831. First, we quoted our statement in *Drummey* that " 'the findings of the board come before the court with a strong presumption of their correctness' " (*Dare*, *supra*, 21 Cal.2d at p. 798), and explained: "If

there is no requirement for formal findings and none are made, findings in favor of the prevailing party are implied from the determination of the board." (*Id.* at pp. 798-799.) Second, regarding *Laisne*'s reference to "trial de novo" in the trial court (*id.* at pp. 793-794), we clarified ***814** that a petitioner seeking a writ of mandate to overturn an administrative determination generally is bound by the record made at the administrative hearing, and may present additional evidence to the trial court only if such evidence could not "in the exercise of reasonable diligence, ... have been introduced before the board. " (*Id.* at p. 799.) [FN6]

> FN6 *Dare, supra,* 21 Cal.2d 790, like *Laisne, supra,* 19 Cal.2d 831, was a four-to-three decision. Again, three dissenters, this time led by Justice Traynor, asserted that review should be by certiorari (and the substantial evidence standard of review), rather than mandate (and the independent judgment standard of review). (21 Cal.2d at p. 803 et seq.)

A few months after *Dare,* we decided *Sipper v. Urban* (1943) 22 Cal.2d 138 [137 P.2d 425] (*Sipper*). In that matter the petitioner unsuccessfully sought a writ of mandate in the trial court to compel an administrative agency to vacate an order suspending his real estate license. The trial court, exercising independent judgment, denied the writ. We affirmed, commenting that "[i]n his application for a writ it was incumbent upon [the petitioner] to state a prima facie case entitling him to relief." (*Id.* at p. 141.) In a concurring opinion, Justice Schauer described the state of the law as follows: "The procedure as now declared gives the reviewing court the power and duty of exercising an independent judgment as to both facts and law, but contemplates that the record of the administrative board shall come before the court endowed with a strong presumption in favor of its regularity and propriety in every respect and that the burden shall rest upon the petitioner to support his challenge affirmatively, competently, and convincingly. In other words, rarely, if ever, will a board determination be disturbed unless the petitioner is able to show a jurisdictional excess, a serious error of law, or an abuse of discretion on the facts." (*Id.* at p. 144 (conc. opn. of Schauer, J.).) [FN7]

> FN7 Justice Schauer, who had only recently joined the court, also addressed the views of the three dissenting justices who would have recognized a right to judicial review of final administrative determinations by certiorari (and the substantial evidence standard of review), rather than mandate (and the independent judgment standard of review). Justice Schauer explained that although he agreed that certiorari rather than mandate appeared to be the most appropriate mode of review " from the academic standpoint" (22 Cal.2d at p. 146 (conc. opn. of Schauer, J.), he would adhere to the majority view in part out of respect for stare decisis.
> Further, addressing the electorate's rejection of Proposition 16 in 1942- which, as noted *ante*, at page 813, would have permitted the Legislature or any chartered city (or city and county) to subject the determinations of administrative agencies to only substantial evidence review instead of the broader independent judgment review afforded by this court's precedents-Justice Schauer observed that "[b]y this overwhelming vote the people expressed their preference for the liberal policy followed by the court as opposed to the narrower one proposed to them. The State of California must therefore be recognized as committed to the broader policy encompassed by the mandamus procedure." (*Sipper, supra,* 22 Cal.2d 138, 153 (conc. opn. of Schauer, J.).)

B

Shortly thereafter, echoing suggestions in Justice Schauer's concurring opinion in *Sipper, supra,* 22 Cal.2d at page 146 et seq., the Legislature ***815** enacted and the Governor signed legislation directing the Judicial Council to "make a thorough study of the subject ... of review of decisions of administrative boards, commissions and officers[,] ... formulate a comprehensive and detailed plan," and report its recommendations to the Legislature along with "drafts of such legislative measures as may be calculated to carry out and effectuate the plan." (Stats. 1943, ch. 991, § 2, p. 2904.) The Judicial Council of California did so in its Tenth Biennial Report (1944) (Report). (See generally, Kleps, *California's Approach to the Improvement of Administrative Procedure* (1944) 32 Cal.L.Rev. 416.) The Report recommended, and the Legislature adopted with only minor changes, three major pieces of legislation: a statewide Department of Administrative Procedure (Rep., *supra,* at p. 10 et seq.; *id.*, appen. A, p. 31 et seq.; see Gov. Code § 11370.2 et seq.); the Administrative Procedure Act (Rep., *supra,* at p. 12 et seq.; *id.*, appen. A, p. 33 et seq.; see Gov. Code, § 11370); and the statute that we consider in the case now before us, section 1094.5

(Rep., *supra,* at p. 26 et seq.; *id.*, appen. A, p. 45 et seq.).

Regarding section 1094.5, the Judicial Council's 1944 Report noted that the proposed legislation did "not depart from the procedural pattern laid down by recent court decisions" (Rep., *supra,* at p. 26), but instead made provision " for the cases in which the court has the power to exercise an independent judgment on the evidence and also for cases in which the court merely examines the record to ascertain whether the decision is supported by substantial evidence." (*Id.* at p. 27.) Regarding the limitations recognized by *Drummey* and its progeny, upon the trial court's exercise of independent judgment, the Report stated: "[I]n [exercising an independent judgment on the facts and making their own findings], the courts must give effect to a presumption in favor of the agency's action ...." (Rep., *supra,* appen. B, pt. 3, at p. 141.) The Report asserted that "the exact effect of this presumption is impossible to estimate" (*ibid.*), but observed that the presumption arose from *Drummey*, *Dare*, and *Sipper*, and that it is based "upon the provisions of Code Civ. Proc., Sec. 1963[, subdivision] (15) [currently set out at Evidence Code section 664, presuming] that official duties have been regularly performed." (Rep., *supra,* appen. B, pt. 3, at p. 141, fn. 57.) The Report concluded on this point that the presumption in favor of agency findings "*has the effect of an admonition to the court and of casting the burden of proof upon the person seeking to overthrow the administrative action.*" (*Ibid.*, italics added.)

As indicated, the Legislature adopted and the Governor signed into law section 1094.5 as proposed by the Judicial Council in its 1944 Report. (Stats. 1945, ch. 868, § 1, p. 1636.) Although the statute has been amended on many occasions since then, subdivisions (b) and (c), as relevant here, have remained substantively unchanged. ***816**

C

(1) From this history it is apparent that section 1094.5 "is a codification of the procedure devised for reviewing the adjudications of ... administrative agencies" in the series of cases outlined above in part II.A, and that "the scope of review under the ... statute is the same as that specified in those cases." (*Temescal Water Co.* v. *Dept. Public Works* (1955) 44 Cal.2d 90, 105 [280 P.2d 1].) As observed in *Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384 [184 P.2d 323], the Judicial Council's 1944 Report "is a most valuable aid in ascertaining the meaning of the statute.... [T]he council drafted this language at the request of the Legislature, and in this respect was a special legislative committee. As part of its special report containing the proposed legislation [the Judicial Council] told the Legislature what it intended to provide by the language used. *In the absence of compelling language in the statute to the contrary, it will be assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report.*" (81 Cal.App.2d at p. 397, italics added; accord, *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 817 [140 Cal.Rptr. 442, 567 P.2d 1122] (*Anton*).)

Consistent with these observations, in the decades following the adoption of section 1094.5, a number of cases have quoted and acknowledged the limitations (recognized in the Judicial Council's Report) placed by *Drummey* and its progeny upon independent judgment review. In *Bixby v. Pierno* (1971) 4 Cal.3d 130 [93 Cal.Rptr. 234, 481 P.2d 242] (*Bixby*), the leading modern case discussing and explaining the independent judgment test, [FN8] we quoted with approval *Drummey*'s statement that in applying " 'independent ***817** judgment,' " a trial court must accord a " 'strong presumption of ... correctness' " to administrative findings, and that the "burden rests" upon the complaining party to show that the administrative " 'decision is contrary to the weight of the evidence.' " (*Id.* at p. 139; see also *Campbell v. Board of Dental Examiners* (1971) 17 Cal.App.3d 872, 875-876 [95 Cal.Rptr. 351] [a strong presumption supports the correctness of the findings of an administrative agency, and the burden of proof rests upon the petitioner to establish administrative error]; *Chamberlain v. Ventura County Civil Service Com.* (1977) 69 Cal.App.3d 362, 368 [138 Cal.Rptr. 155] [quoting *Drummey*' s "strong presumption of ... correctness" and burden of proof qualifications on independent judgment review]; *San Dieguito Union High School Dist. v. Commission on Professional Competence* (1982) 135 Cal.App.3d 278, 288 [185 Cal.Rptr. 203] [commission's "factual finding is entitled to substantial weight even in an 'independent judgment' hearing before the superior court"].) [FN9]

FN8 *Bixby* reaffirmed and clarified our case law, holding that when a trial court reviews a final administrative decision that substantially affects a fundamental vested right, the court "not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence ...." (*Bixby, supra,* 4 Cal.3d at p. 143.) By contrast, we explained, the case law stands for the proposition that "

[i]f the administrative decision does not involve, or substantially affect, any fundamental vested right, the trial court must still review the entire administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law, but the trial court need not look beyond that whole record of the administrative proceedings." (*Id.* at p. 144, fn. omitted.)
In response to arguments of a dissenting justice that the independent judgment test should be abandoned in favor of the substantial evidence test, the majority asserted that "[i]n view of [the] judicial history [of section 1094.5], the court would now assert a doubtful prerogative if it were to rule that no cases at all require an independent judgment review and that the Legislature created an empty category in section 1094.5. " (4 Cal.3d at p. 140.) The court in *Bixby* concluded that application of the independent judgment standard does not impose on trial courts a burden that is "significantly more" than that imposed by substantial evidence review (*id.* at p. 143, fn. 10), and that independent judgment review is necessary to protect individual liberty: "At a time in this technocratic society when the individual faces ever greater danger from the dominance of government and other institutions wielding governmental power, we hesitate to strip him of a recognized protection against the overreaching of the state. The loss of judicial review of a ruling of an administrative agency that abrogates a fundamental vested right would mark a sorry retreat from bulwarks laboriously built. Such an elimination would not only overrule decisions long held in California, but destroy a bed-rock procedural protection against the exertion of arbitrary power." (*Id.* at p. 151.)

FN9 Three years after *Bixby, supra,* 4 Cal.3d 130, our decision in *Strumsky, supra,* 11 Cal.3d 28, extended the independent judgment standard of review to the final determinations of local administrative boards, thereby overturning a number of cases (including *Walker, supra,* 20 Cal.2d 879) holding that the decisions of such boards are subject only to substantial evidence review. Thereafter, in *Anton, supra,* 19 Cal.3d 802, this court in turn extended *Strumsky* to the determinations of nongovernmental agencies subject to review under section 1094.5.

III

Despite this history, the Court of Appeal below concluded that *Drummey* and its progeny should not control, and that when exercising independent judgment a trial court may not afford the agency's findings any presumption of correctness, and must place the burden of proof on the entity supporting the administrative agency's decision.

(2) We reject the Court of Appeal's conclusion, under which agency determinations and findings would be entitled to no weight at all, and affirm the rule first articulated in *Drummey,* reaffirmed in *Dare* and *Sipper,* implicitly codified by the Legislature in section 1094.5, and thereafter reaffirmed by numerous opinions including *Bixby*: In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence. ***818**

As explained below, opposing arguments advanced by Fukuda and accepted by the Court of Appeal are unpersuasive.

The Court of Appeal held, and Fukuda here asserts, that it would be confusing and inconsistent for a superior court to presume the correctness of administrative findings, and still exercise independent judgment review. Some justices and scholars who champion the more deferential substantial evidence standard of review have unsuccessfully advanced the same assertion in the course of arguing *against* the retention of independent judgment review. [FN10] But the assertion of incompatibility is no more persuasive when it comes, as in this case, from the *advocates of* independent judgment review. As explained by the Judicial Council's 1944 Report, the presumption "has the effect of an admonition to the court." (Rep., *supra,* appen. B, pt. 3, at p. 141, fn. 57.) In other words, the presumption provides the trial court with a starting point for review-but it is only a presumption, and may be overcome. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings. This approach to the trial court's exercise of independent judgment long has been understood, and

was, in fact, illustrated by *Drummey* itself, in which we twice observed that the trial court "weighed the evidence giving due weight to the presumption in favor ***819** of the board's findings, but nevertheless, exercising its independent judgment, found against the board. " (13 Cal.2d at p. 86; see also *id.* at p. 88.) As shown by *Drummey* and its progeny, there is no inconsistency in a rule requiring that a trial court begin its review with a presumption of the correctness of administrative findings, and then, after affording the respect due to these findings, exercise independent judgment in making its own findings. (Accord, *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 [78 Cal.Rptr.2d 1, 960 P.2d 1031] [when interpreting a statute, a court must afford deference to the agency's interpretation, but ultimately exercise its own independent judgment]; cf. *People v. Lang* (1989) 49 Cal.3d 991, 1045 [264 Cal.Rptr. 386, 782 P.2d 627].)

FN10 Justice Burke's concurring opinion in *Bixby, supra,* 4 Cal.3d 130, 151, echoing earlier scholarly criticism of the independent judgment test (e.g., Kleps, *Certiorarified Mandamus Review: The Courts and California Administrative Decisions-1949-1959* (1960) 12 Stan.L.Rev. 554; Netterville, *Judicial Review: The "Independent Judgment" Anomaly* (1956) 44 Cal.L.Rev. 262; McGovney, *Administrative Decisions and Court Review Thereof in California* (1941) 29 Cal.L.Rev. 110), asserted that independent judgment review provided insufficient deference to and respect for administrative determinations, and argued for abandonment in favor of substantial evidence review. In the process, Justice Burke, like the cited scholarly criticism, observed that the "presumption of correctness" and burden of proof articulated in *Drummey, supra,* 13 Cal.2d 75, and *Dare, supra,* 21 Cal.2d 790, "diminish the independence of the trial courts' review"-a result that Justice Burke and the commentators obviously approved as affording respect for the "expertise and discretion which, presumably, underlies any such [administrative] decision." (*Bixby, supra,* 4 Cal.3d at p. 154 (conc. opn. of Burke, J.).) As part of his general argument against independent judgment review, however, Justice Burke went on to assert-without analysis-that "commentators assume that the so-called 'presumption' will be ignored by the trial courts, since it is totally inconsistent with the concept of an independent judgment review. See, e.g., Kleps, *supra,* ... at page 577; Netterville, *supra,* ... at pages 279-280; McGovney, *supra,* ... at pages 129-130." (*Bixby, supra,* 4 Cal.3d at p. 154, fn. 12; accord, *Anton, supra,* 19 Cal.3d 802, 831, fn. 1 (dis. opn. of Clark, J.) ["Such a presumption, while perhaps desirable, appears inconsistent with the concept of independent judgment. "]; Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies* (1995) 42 UCLA L.Rev. 1157, 1168, fn. 35 ["[I]t is difficult to reconcile [the] presumption with the independent judgment test. In practice, it appears that the ... presumption is ignored. "].) As explained in the text above, we do not find either the presumption or the allocation of burden of proof to be incompatible with the exercise of independent judgment.

The Legislature's enactment of section 1094.5-in light of the Judicial Council's 1944 Report, and *Drummey* and its progeny-indicates legislative acceptance of the limitations placed by *Drummey* and later cases upon independent judgment review. The Legislature's subsequent failure to amend section 1094.5, subdivision (c), to remove those limitations further suggests legislative acceptance of the limitations. (See *Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 608-609 [257 Cal.Rptr. 320, 770 P.2d 732].) Indeed, in the course of making numerous amendments to the Administrative Procedure Act (see Stats. 1995, ch. 938), the Legislature recently has embraced similar limitations. Government Code section 11425.50, subdivision (b), directs trial courts to give "great weight" to credibility determinations of state agency hearing officers, even when the trial court conducts independent judgment review under section 1094.5. [FN11] Obviously, the Legislature sees no inconsistency in having the trial court first afford "great weight" to credibility determinations, and then exercise independent judgment in making its own findings.

FN11 This subdivision provides in relevant part: "If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the

> extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it." (Gov. Code, § 11425.50, subd. (b).)

(3) The Court of Appeal also held, and Fukuda here contends, that *Drummey, supra,* 13 Cal.2d 75, does not impose a burden of *proof* (defined in Evid. Code, § 115) on the party contesting an administrative action, but instead imposes, at most, a burden of *production* (defined in Evid. Code, § 110) on that party. We find no support for this view.

Evidence Code section 500 states that "[e]xcept as ... provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. " ***820** This provision applies to writ proceedings under section 1094. (Evid. Code, § 300 ["Except as otherwise provided by statute, [the] code applies in every action before the ... superior court ...."].) Contrary to the Court of Appeal's unsupported statement that "section 1094.5 provides otherwise," that statute does so neither expressly nor implicitly. Indeed, as noted above, the history of the Judicial Council's 1944 Report demonstrates that the Legislature intended that section 1094.5 embrace Evidence Code section 500's traditional allocation of the burden of proof. [FN12]

> FN12 In support of its contrary view, the Court of Appeal relied upon *Webster v. Trustees of Cal. State University* (1993) 19 Cal.App.4th 1456, 1466 [24 Cal.Rptr.2d 150], in which the Court of Appeal remanded the matter to the trial court with directions to exercise independent judgment and to place the burden of proof upon the party supporting the administrative determination. As Fukuda concedes, *Webster* is inapposite and distinguishable. The Court of Appeal's remand directions in *Webster* constituted a case-specific remedy to correct a burden-allocation error made at the administrative level, and the case does not purport to stand for the proposition that, as a general matter, the burden of proof rests with the party seeking to support the administrative determination.

But, even without reference to Evidence Code section 500, both the allocation of burden of proof and the nature of that burden articulated in *Drummey* are clear on the face of our opinion in that case. Contrary to Fukuda's suggestion that the burden of proof did not rest with him, and that " the 'burden of proof' discussed in *Drummey* appears to go [only] to the burden on the petitioner to produce evidence in support of his claims," the language of the court in *Drummey*-"*the burden rests on the complaining party to convince the court that the board's decision is contrary to the weight of the evidence*" (*Drummey, supra,* 13 Cal.2d at p. 85, italics added)-plainly casts upon "the complaining party" (and not the administrative agency) a burden of proof or persuasion, and not a mere burden of production or of coming forward with evidence.

In support of its contrary holding, the Court of Appeal stated, and Fukuda now contends, that the statutory presumption that "official duty has been regularly performed" (Evid. Code, § 664)-which, as noted above, was cited in *Drummey* as an important factor, along with administrative expertise, in explaining why administrative findings are presumed to be correct (13 Cal.2d at p. 86)-" 'goes only to the burden of *producing* evidence.' " (Quoting *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770, 777 [128 Cal.Rptr. 781] (*Kleist*), italics added.) Hence, it is argued, any burden recognized by *Drummey* should be seen as one of mere production, and not persuasion. The Court of Appeal's premise is questionable: Evidence Code section 664 long has been classified by the Legislature as a presumption affecting the burden of proof (defined in Evid. Code, § § 605, 660 et seq. [listing presumptions affecting burden of proof]), rather than one affecting ***821** the burden of producing evidence (defined in Evid. Code, § § 603, 630 et seq. [listing presumptions affecting burden of producing evidence].) In any event, regardless whether the section 664 presumption properly may be characterized, as implied by the opinion of the Court of Appeal and asserted here by Fukuda, as " fall[ing] from the case" if and when the petitioner presents an adequate record on review, [FN13] the " strong presumption" of the correctness of administrative findings that we articulated in *Drummey* is separate and different in nature, and based upon additional considerations-including our observation that such findings often are the product of expertise. Indeed, it is clear from *Drummey* that we did not contemplate that the presumption would "drop out" once the petitioner met his or her burden of production: As noted above, our opinion spoke of the trial court's obligation to apply the presumption even though it was clear that the burden of production had been satisfied. (*Drummey, supra,* 13 Cal.2d at pp. 86, 88.) [FN14]

FN13 The Court of Appeal relied upon the

following statement in *Kleist, supra,* 56 Cal.App.3d at page 777: "The presumption of performance of official duty, contained in Evidence Code section 664, goes only to the burden of producing evidence ...." As the City observes, however, the Evidence Code itself, and other decisions construing the code, are to the contrary. (Evid. Code, § 660 et seq.; *Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133, 143 [7 Cal.Rptr.2d 818] ["The presumption in Evidence Code section 664 affects the burden of proof."].)

FN14 To satisfy its burden of production at the *administrative hearing*, the public agency must produce evidence of misconduct by the employee. Unless it does so, the employee has no burden to produce evidence that no misconduct occurred. To satisfy his or her burden of production at the *administrative mandamus hearing* under section 1094.5, the employee need only produce a complete record of the administrative hearing-and this record will, in any event, be prepared by the agency. (See Code Civ. Proc., § 1094.6, subd. (c).)

Other objections noted by the Court of Appeal and raised here by Fukuda may be disposed of quickly.

Fukuda suggests that because section 1094.5, as adopted (and as it exists today), does not expressly codify the presumption of correctness set out in *Drummey,* it should be inferred that the Legislature did not intend to adopt that rule. The legislative history-including the Judicial Council's 1944 Report, discussed *ante*, in part II.B, and the Legislature's failure to amend the statute to avoid the limitations set out in *Drummey* and its progeny-demonstrates otherwise.

Fukuda and amicus curiae on his behalf assert in conclusory fashion that the limitations on independent judgment review, articulated in *Drummey* and its progeny, should be ignored, because they allegedly constituted dictum when first set out in *Drummey.* Our opinion in *Drummey* affirmed the issuance of a peremptory writ of mandate. We could not have done so without deciding whether the trial court had proceeded in a manner that ***822** respected and took into account the presumption discussed in our opinion. As noted above, we expressly found that the trial court properly did so proceed, and exercised its independent judgment. The challenged aspect of *Drummey* was not dictum. Even if this were not so, the subsequent adoption of the challenged presumption and burden allocation by *Dare* and *Sipper,* their acceptance by the Legislature, and the subsequent reaffirmation of the challenged presumption and burden allocation by *Bixby* more than adequately establish the bona fides of the challenged presumption and burden allocation today.

Fukuda and amicus curiae on his behalf assert that the existence of the " presumption of correctness" has not been accepted and that the presumption has been "ignored" in practice. We find no support in the record for this assertion. Our opinion herein will reaffirm for the future that the presumption continues to exist.

Fukuda suggests that constitutional considerations preclude any limitation (such as the challenged presumption, or the challenged allocation of the burden of proof) on a trial court's exercise of independent judgment. There was no authority for this proposition when *Drummey* was decided, and there is none now. Indeed, the more recent decisions suggest that the independent judgment test itself is not constitutionally compelled, even in cases substantially affecting fundamental vested rights, when, as here, the underlying administrative procedure includes ample safeguards designed to ensure fairness. (*Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.* (1979) 24 Cal.3d 335, 346 [156 Cal.Rptr. 1, 595 P.2d 579] (*Tex-Cal*).) [FN15]

FN15 The reasoning of the plurality opinion in *Tex-Cal, supra,* 24 Cal.3d 335, casts doubt on the suggestion in *Drummey, supra,* 13 Cal.2d at pages 84-85, that the independent judgment standard of judicial review is compelled by the due process clauses of the state and federal Constitutions, and the suggestion in *Laisne, supra,* 19 Cal.2d at pages 834-845, that the independent judgment standard of review, and a trial de novo, are required by separation of powers considerations. Fukuda asserts that "recent decisions" by the United States Supreme Court have " affirmed" that independent judgment review is required by the due process clause, but he cites no authority for that proposition and we are aware of none.

Finally, Fukuda asserts that the judicial "trend" is to

expand the scope of writ of mandate review by the trial court, and not to "confer more power" on administrative agencies. Our task is to construe the statute, not to discern trends. In any event, both *Tex-Cal, supra*, 24 Cal.3d 335, and recently enacted Government Code section 11425.50, subdivision (b) (discussed and quoted *ante*, at p. 819), refute the suggested existence of such a judicial or legislative "trend." ***823**

IV

The City, joined by amici curiae, [FN16] urges this court to reconsider and abandon *Drummey*'s "independent judgment" standard of review and the case law that has developed to guide courts in administering and implementing that standard. They suggest that the independent judgment test is not constitutionally compelled, and that its use is not generally required in any other jurisdiction, state or federal. They argue, among other things, that (i) our case law is illogical in requiring independent judgment review of fundamental vested rights determined by local and many statewide agencies, but permitting substantial evidence review of the decisions of constitutional agencies; (ii) our case law creates confusion as to what sorts of interests are "fundamental" and "vested" and hence trigger independent judgment review; (iii) use of the independent judgment standard of review imposes increased and unnecessary burdens on our congested trial courts; (iv) use of independent judgment review frequently calls upon trial court judges, as generalists, to substitute their judgment for the more qualified judgment of expert administrators, and promotes disparate results when similar cases from the same agency are heard by different trial court judges; and (v) use of the independent judgment standard of review is not necessary in order to safeguard individual liberties.

FN16 Briefs proposing that we abandon independent judgment review have been filed by UCLA Law School Professor Michael Asimow and the California School Boards Association (joined by 84 California cities). The Attorney General has filed a brief in which he "agrees with Professor Asimow ... that it is time for this Court to reexamine the scope of review of administrative mandamus proceedings." Briefs urging us to retain independent judgment review have been filed by Lackie & Dammeier LLP (a law firm that represents public employee unions, associations, and related groups), and the Peace Officers' Research Association of California Legal Defense Fund et al.

We considered and rejected most of these arguments almost three decades ago, in *Bixby, supra*, 4 Cal.3d 130. As we have seen, the independent judgment standard of review was first articulated in decisions issued in the 1930's and early 1940's; in 1942, the voters of this state rejected a proposed constitutional amendment that would have modified those decisions; and in 1945, the Legislature, relying upon a comprehensive report that carefully reviewed the governing cases, essentially codified the independent judgment standard of review through its enactment of section 1094.5. For more than half a century, California courts have applied that standard of review, in accordance with the provisions of section 1094.5. Under these circumstances, we believe that those who advocate abandonment of the independent judgment standard of review on the basis of policy appropriately should ***824** direct their concerns and arguments for revision to the Legislature, rather than to this court. [FN17]

FN17 We observe that the Legislature has been free for the past two decades to specify, consistently with *Tex-Cal, supra*, 24 Cal.3d 335, 346, that certain administrative determinations need to be subjected only to substantial evidence review rather than independent judgment review. During that period, the Legislature selectively has acted to so specify with regard to some agency decisions (see Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies, supra*, 42 UCLA L.Rev. 1157, 1176, fn. 62), but expressly has mandated independent judgment review with regard to other agency determinations, including those concerning dismissal of public school teachers. (*Ibid.*; Ed. Code, § § 44945, 87682.)

V

(4) Even when, as here, the trial court is required to review an administrative decision under the independent judgment standard of review, the standard of review on appeal of the trial court's determination is the substantial evidence test. (*Drummey, supra*, 13 Cal.2d at p. 86; *Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 72-75 [64 Cal.Rptr. 785, 435 P.2d 553].) (5) In the present case, however, we cannot properly review the trial court's findings and decision for substantial evidence, because that court's findings are themselves infected

by fundamental error: The trial court erred by placing the burden of proof on the City, and by failing to accord a presumption of correctness to the administrative findings.

Fukuda asserts that we nevertheless may affirm the judgment because, he claims, the trial court's misallocation of the burden of proof and apparent failure to presume the correctness of the administrative findings did not affect its decision. The record, however, does not support this contention, and instead demonstrates that the trial court relied repeatedly upon the City's failure to meet its burden of proof. Indeed, the trial court stressed that, with regard to the question whether Fukuda's involvement in the pursuit was " unreasonably dangerous," the evidence was "evenly balanced, and the party having the burden of proof loses." As Fukuda concedes, "had [he] bor[ne] the burden of proof as to this charge, the finding would have been sustained ... against [him]"-and as the City observes, that finding, in conjunction with the sustained finding that Fukuda engaged in a prohibited roadblock, may have supported the city council's termination decision. Accordingly, and in view of the trial court's misallocation of the burden of proof, and the administrative findings of dishonesty on the part of Fukuda, it would be inappropriate at this point to affirm the trial court's judgment barring termination of Fukuda's employment.

At the same time, however, we also reject the City's suggestion that we may reverse the judgment and reinstate the city council's decision to terminate Fukuda's employment, on the ground that the evidence amply supports ***825** the administrative findings. On the record before us, we cannot foreclose the possibility that the trial court, after exercising its independent judgment as described above, reasonably could conclude that the city council's termination decision was an abuse of discretion. (See *Magit v. Board of Medical Examiners* (1961) 57 Cal.2d 74, 87 [17 Cal.Rptr. 488, 366 P.2d 816].)

We reverse the judgment of the Court of Appeal and direct that court to remand the matter to the trial court for further proceedings consistent with this opinion.

Mosk, J., Kennard, J., Baxter, J., Werdegar, J., Chin, J., and Brown, J., concurred. ***826**

Cal. 1999.

TIMOTHY FUKUDA, Plaintiff and Appellant, v. CITY OF ANGELS, Defendant and Appellant.

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Briefs and Other Related Documents

Supreme Court of California
SIERRA CLUB et al., Plaintiffs and Appellants,
v.
SAN JOAQUIN LOCAL AGENCY FORMATION COMMISSION, Defendant and Respondent;
Califia Development Group et al., Real Parties in Interest and Respondents.
No. S072212.

Aug. 19, 1999.

Interest groups and individuals who had unsuccessfully challenged approval of city's annexation of territory by local agency formation commission (LAFCO) petitioned for writ of mandamus seeking to overturn LAFCO's approval of annexation, and finding of overriding considerations sufficient to outweigh environmental impacts identified in environmental impact report (EIR). The Superior Court, San Joaquin County, No. CV001997, Bobby W. McNatt, J., dismissed petition for failure to exhaust administrative remedies. Petitioners appealed, and the Court of Appeal affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal. Following review, the Supreme Court, Werdegar, J., held that: (1) subject to statutory limitations, right to petition for judicial review of final administrative agency decision is not necessarily affected by the party's failure to file a request for reconsideration or rehearing, overruling *Alexander*, 22 Cal.2d 198, 137 P.2d 433; (2) decision applies retroactively; and (3) petition for rehearing or reconsideration by LAFCO thus was not prerequisite to judicial review.

Court of Appeal reversed, and remanded.

Opinion, 75 Cal.Rptr.2d 846, vacated.

West Headnotes

[1] **Municipal Corporations** 33(1)
268k33(1) Most Cited Cases
Local agency formation commissions (LAFCOs) are administrative bodies created pursuant to the Local Government Reorganization Act to control the process of municipality expansion. West's Ann.Cal.Gov.Code § 56000 et seq.

[2] **Municipal Corporations** 33(8)
268k33(8) Most Cited Cases
An annexation determination by a local agency formation commissions (LAFCO) is quasi-legislative, and judicial review thus arises under ordinary mandamus provisions of Code of Civil Procedure, rather than administrative mandamus provisions. West's Ann.Cal.C.C.P. § § 1085, 1094.5; West's Ann.Cal.Gov.Code § 56000 et seq.

[3] **Administrative Law and Procedure** 229
15Ak229 Most Cited Cases
Subject to limitations imposed by statute, right to petition for judicial review of a final decision of an administrative agency is not necessarily affected by the party's failure to file a request for reconsideration or rehearing before the agency; overruling *Alexander v. State Personnel Bd.*, 22 Cal.2d 198, 137 P.2d 433, and abrogating *Clark v. State Personnel Board*, 61 Cal.App.2d 800, 144 P.2d 84, and *Child v. State Personnel Board*, 97 Cal.App.2d 467, 218 P.2d 52.

[4] **Administrative Law and Procedure** 229
15Ak229 Most Cited Cases
Basic purpose of exhaustion of administrative remedies doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief.

[5] **Administrative Law and Procedure** 229
15Ak229 Most Cited Cases
Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, exhaustion of administrative remedies doctrine is still viewed with favor, because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.

[6] **Courts** 89
106k89 Most Cited Cases
Fundamental jurisprudential policy of "stare decisis" provides that prior applicable precedent usually must be followed, even though the case, if considered anew, might be decided differently by the current justices.

[7] Courts 89
106k89 Most Cited Cases
Doctrine of stare decisis is based on the assumption that certainty, predictability, and stability in the law are the major objectives of the legal system, so that parties will be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law.

[8] Courts 90(1)
106k90(1) Most Cited Cases
Policy of state decisis is a flexible one which permits court to reconsider, and ultimately to depart from, its own prior precedent in an appropriate case.

[9] Courts 89
106k89 Most Cited Cases
While doctrine of stare decisis serves important values, it should not shield court-created error from correction.

[10] Courts 89
106k89 Most Cited Cases
Significance of stare decisis is highlighted when legislative reliance is potentially implicated.

[11] Courts 89
106k89 Most Cited Cases
Stare decisis has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.

[12] Courts 90(1)
106k90(1) Most Cited Cases
Principles of stare decisis do not preclude a court from ever revisiting its older decisions.

[13] Statutes 220
361k220 Most Cited Cases
Legislature's failure to act may indicate many things other than approval of a judicial construction of a statute, such as the sheer pressure of other and more important business, political considerations, or a tendency to trust to the courts to correct their own errors.

[14] Municipal Corporations 33(8)
268k33(8) Most Cited Cases
Parties who had unsuccessfully objected to approval of city's proposed annexation by local agency formation commission (LAFCO) were not required to petition for rehearing or reconsideration of final decision approving annexation before seeking judicial review of decision of LAFCO. West's Ann.Cal.Gov.Code § 56000 et seq.

[15] Courts 100(1)
106k100(1) Most Cited Cases
Decision of Supreme Court overruling one of its prior decisions ordinarily applies retroactively.

[16] Courts 100(1)
106k100(1) Most Cited Cases
Potential exists for allowing narrow exceptions to general rule that decisions of Supreme Court apply retroactively when considerations of fairness and public policy are so compelling in a particular case that, on balance, they outweigh the considerations that underlie the basic rule, and a court may decline to follow the standard rule when retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law.

[17] Courts 100(1)
106k100(1) Most Cited Cases
Decision of Supreme Court that, subject to limitations imposed by statute, right to petition for judicial review of a final decision of an administrative agency is not necessarily affected by the party's failure to file a request for reconsideration or rehearing before the agency, which overruled *Alexander v. State Personnel Bd.*, applies retroactively.

[18] Courts 100(1)
106k100(1) Most Cited Cases
All things being equal, it is preferable for Supreme Court to apply its decisions in such a manner as to preserve, rather than foreclose, a litigant's day in court on the merits of his or her action.

[19] Administrative Law and Procedure 229
15Ak229 Most Cited Cases
Failure to request reconsideration or rehearing of a final decision of an administrative agency may in certain circumstances serve as a bar to judicial review of a final decision of an administrative agency.

[20] Administrative Law and Procedure 229
15Ak229 Most Cited Cases
Petition for reconsideration or rehearing of final decision of administrative agency is necessary to

introduce evidence or legal arguments before the administrative agency that were not brought to its attention as part of the original decisionmaking process.

[21] **Administrative Law and Procedure** 229
15Ak229 Most Cited Cases
Administrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum.

***705 *492 **545** Brandt-Hawley & Zoia and Susan Brandt-Hawley, Glen Ellen, for Plaintiffs and Appellants.

***493** Nancy N. McDonough and David Guy, Sacramento, for Plaintiff and Appellant San Joaquin Farm Bureau Federation.

Remy, Thomas and Moose, Michael H. Remy, James G. Moose, John H. Mattox, Sacramento, and Lee Axelrad, for the Planning and Conservation League as Amicus Curiae on behalf of Plaintiffs and Appellants.

Herum, Crabtree, Dyer, Zolezzi & Terpstra, Steven A. Herum and Thomas H. Terpstra, Stockton, for Defendant and Respondent and for Real Parties in Interest and Respondents Gold Rush City Holding Company, Inc., and Califia Development Group.

Susan Burns Cochran, City Attorney, for Real Party in Interest and Respondent City of Lathrop.

Van Bourg, Weinberg, Roger & Rosenfeld and Sandra Rae Benson, Oakland, for the Northern California District Council of Laborers as Amicus Curiae on behalf of Defendant and Respondent and Real Parties in Interest and Respondents.

Meyers, Nave, Riback, Silver & Wilson, Andrea J. Saltzman and Rick W. Jarvis, San Leandro, for Seventy Four California Cities as Amicus Curiae on behalf of Real Parties in Interest and Respondents.

WERDEGAR, J.

In *Alexander v. State Personnel Bd.* (1943) 22 Cal.2d 198, 137 P.2d 433 (*Alexander*), we held that when the Legislature has provided that a petitioner before an administrative tribunal "may" seek reconsideration or rehearing [FN1] of an adverse decision of that tribunal, ****546** the petitioner always must seek reconsideration in order to exhaust his or her administrative remedies prior to seeking recourse in the courts. The *Alexander* rule has received little attention since its promulgation, and several legal scholars and at least one Court of Appeal have expressed the belief that the rule has been abandoned or legislatively abrogated. That conclusion was premature; the rule remains controlling law. However, as it serves little practical purpose and is inconsistent with procedure in parallel contexts, we hereby abandon it. This is not to say that reconsideration of agency actions need never be sought prior to judicial review. Such a request is necessary ***494** where appropriate to raise matters not previously brought to the agency's attention. We simply see no necessity that parties file pro forma requests for reconsideration raising issues already fully argued before the agency, and finally decided in the administrative decision, solely to satisfy the procedural requirement imposed in *Alexander*.

FN1. The terms "reconsideration" and "rehearing" are used interchangeably by the literature and case authority in this area, as well as by the parties to this appeal. Perceiving no fundamental difference between the two terms for purposes of this case, we will do the same.

I. FACTUAL AND PROCEDURAL HISTORY

In early 1996, the City of Lathrop (City) approved a proposal for a large development project on several thousand acres of farmland outside of city limits. A plan was approved, an environmental impact report (EIR) was certified, and a development agreement was executed. A second plan was approved to double the capacity of the City's wastewater treatment facility, ***706** and a separate EIR was certified for that project.

Proceedings were commenced before the San Joaquin Local Agency Formation Commission (SJLAFCO) to obtain approval of the City's annexation of the territory. The Sierra Club, the San Joaquin Farm Bureau Federation, Eric Parfrey and Georgianna Reichelt (collectively petitioners) objected in that proceeding. SJLAFCO overruled their objections and approved the proposed annexation; it also adopted a finding of overriding considerations with regard to the environmental impacts identified in the EIR.

Parfrey sent a letter to SJLAFCO requesting reconsideration of the approval. In the letter he asserted the required $700 filing fee for the reconsideration would be forthcoming. The next day

he withdrew his request and, together with the other petitioners, filed this mandamus petition in the superior court. The suit named SJLAFCO as respondent, and various developers including Califia Development Group (Califia), the City and others as real parties in interest. The petition alleged a lack of substantial evidence to support the finding of overriding considerations with respect to the environmental impacts identified in the EIR and, alternatively, that SJLAFCO failed to follow the applicable statutory provisions related to territory annexation.

Califia moved to dismiss the petition. Observing that Government Code section 56857, subdivision (a) provides that an aggrieved person may request reconsideration of an adverse local agency formation commission (LAFCO) resolution, Califia argued that under the authority of *Alexander, supra,* 22 Cal.2d at page 200, 137 P.2d 433, such a request is a mandatory prerequisite to filing in the courts. Petitioners responded that the *Alexander* rule is no longer good law, as reflected in *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1475, 277 Cal.Rptr. 481. The trial court granted the motion to dismiss.

***495** The Court of Appeal affirmed. The majority concluded dismissal was compelled by *Alexander,* despite its view that the *Alexander* rule is "outmoded" and "presents a fitful trap for the unwary." We granted review.

II. THE LAFCO STATUTORY SCHEME

[1][2] LAFCO's are administrative bodies created pursuant to the Cortese-Knox Local Government Reorganization Act of 1985 (Gov.Code, § 56000 et seq.) to control the process of municipality expansion. The purposes of the act are to encourage "planned, well-ordered, efficient urban development patterns with appropriate consideration of preserving open-space lands within those patterns" (*id.,* § 56300), and to discourage urban sprawl and encourage "the orderly formation and development of local agencies based upon local conditions and circumstances" (*id.,* § 56301). A LAFCO annexation determination is quasi-legislative; judicial ****547** review thus arises under the ordinary mandamus provisions of Code of Civil Procedure section 1085, rather than the administrative mandamus provisions of Code of Civil Procedure section 1094.5. (*City of Santa Cruz v. Local Agency Formation Com.* (1978) 76 Cal.App.3d 381, 387, 390, 142 Cal.Rptr. 873.)

Government Code section 56857, subdivision (a) provides: "Any person or affected agency *may* file a written request with the executive officer requesting amendments to or reconsideration of any resolution adopted by the commission making determinations. The request shall state the specific modification to the resolution being requested." (Italics added.) Such requests must be filed within 30 days of the adoption of the LAFCO resolution, and no further action may be taken on the annexation until the LAFCO has acted on the request. (*Id.,* subds. (b), (c).) Nothing in the statutory scheme explicitly states that an aggrieved party must seek rehearing prior to filing a court action.

***707 III. THE *Alexander* Rule

That failure to exhaust administrative remedies is a bar to relief in a California court has long been the general rule. In *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 109 P.2d 942 (*Abelleira*), a referee issued a ruling awarding unemployment insurance benefits to striking employees. The affected employers filed a petition for a writ of mandate without first completing an appeal to the California Employment Commission, as required by the statutory scheme. The appellate court issued an alternative writ and a temporary restraining order blocking payment of the benefits. We, in turn, issued a peremptory writ of prohibition restraining the appellate court from enforcing its writ and order. In so doing, we stated ***496** the general rule that exhaustion of administrative remedies "is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis,* and binding upon all courts.... [E]xhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts." (*Id.* at p. 293, 109 P.2d 942, italics in original.)

The employers in *Abelleira* argued that completing the administrative process would have been futile because the commission had already ruled against their position in prior decisions based upon similar facts. We rejected this argument, noting that a civil litigant is not permitted to bypass the superior court and file an original suit in the Supreme Court merely because the local superior court judge might be hostile to the plaintiff's views. "The whole argument rests upon an illogical and impractical basis, since it permits the party applying to the court to assert without any conclusive proof, and without any possibility of successful challenge, the outcome of an appeal which the administrative body has not even been permitted to decide." (*Abelleira, supra,* 17

Cal.2d at p. 301, 109 P.2d 942.)

We then stated: "It should be observed also that this argument is completely answered by those cases which apply the rule of exhaustion of remedies to rehearings. Since the board has already made a decision, if the argument of futility of further application were sound, then surely this is the instance in which it would be accepted. But it has been held that where the administrative procedure prescribes a rehearing, the rule of exhaustion of remedies will apply in order that the board may be given an opportunity to correct any errors that it may have made. [Citations.]" (*Abelleira, supra,* 17 Cal.2d at pp. 301-302, 109 P.2d 942.)

Two years later we issued *Alexander, supra,* 22 Cal.2d 198, 137 P.2d 433. In that case two civil service employees sought a writ of mandate directing the State Land Commission to reinstate them after the State Personnel Board had upheld their dismissals in an administrative proceeding. The Civil Service Act at the time provided that employees "may apply" for a rehearing within 30 days of receiving an adverse decision of the State Personnel Board. The employees did not seek rehearing before filing the writ petition, and the deadline for doing so passed. The trial court sustained the defendants' demurrer. (*Id.* at p. 199, 137 P.2d 433.)

****548** We affirmed. "The rule that administrative remedies must be exhausted before redress may be had in the courts is established in this state. (*Abelleira v. District Court of Appeal,* 17 Cal.2d 280 [109 P.2d 942, 132 A.L.R. 715],***497** and cases cited at pages 292, 293, 302 [109 P.2d 942].) The provision for a rehearing is unquestionably such a remedy.... [¶] The petitioners ask this court to distinguish between a provision in a statute which requires the filing of a petition for rehearing before an administrative board as a condition precedent to commencing proceedings in the courts [citations], and a provision such as in the present act which it is claimed is permissive only. The distinction is of no assistance to the petitioners under the *****708** rule. If a rehearing is available it is an administrative remedy to which the petitioners must first resort in order to give the board an opportunity to correct any mistakes it may have made. As noted in the *Abelleira* case, *supra,* at page 293 [109 P.2d 942] the rule must be enforced uniformly by the courts. Its enforcement is not a matter of judicial discretion. It is true, the Civil Service Act does not expressly require that application for a rehearing be made as a condition precedent to redress in the courts. But neither does the act expressly designate a specific remedy in the courts. So that where, as here, the act provides for a rehearing, but makes no provision for specific redress in the courts and resort to rehearing as a condition precedent, the rule of exhaustion of administrative remedies supplies the omission." (*Alexander, supra,* 22 Cal.2d at pp. 199-200, 137 P.2d 433.)

Justices Carter and Traynor each dissented. [FN2] Both dissents noted that the Legislature has the ability to make an administrative rehearing a mandatory requirement if it chooses to do so, and that it had already done so explicitly in two statutory schemes enacted prior to *Alexander.* (22 Cal.2d at p. 201, 137 P.2d 433 (dis. opn. of Carter, J.); *id.* at pp. 204- 205, 137 P.2d 433 (dis. opn. of Traynor, J.).) Justice Carter further emphasized that the majority's broad interpretation of the exhaustion requirement is contrary to the principles of procedure ordinarily applicable in judicial and quasi-judicial forums. (*Id.* at p. 201, 137 P.2d 433.) For example, a litigant need not make a motion for a new trial before pursuing an appeal after final judgment in the trial court, nor must that litigant petition the Court of Appeal for rehearing prior to seeking review (or, at that time, hearing) before the Supreme Court after the appellate court issues its decision. (*Ibid.*) Justice Traynor additionally noted that the majority's interpretation was neither compelled by *Abelleira* (22 Cal.2d at p. 205, 137 P.2d 433) nor in accordance with the federal rule (*id.* at p. 204, 137 P.2d 433).

> FN2. Chief Justice Gibson did not participate in the decision.

In 1945, the Legislature passed the Administrative Procedure Act (APA) (then Gov.Code, § 11500 et seq., now Gov.Code, § 11340 et seq.), which governs a substantial portion of the administrative hearings held in this state. The APA and related legislative enactments were the final culmination of a detailed Judicial Council administrative law study ordered by the Legislature ***498** two years earlier. [FN3] The Judicial Council reported its conclusions and recommendations in its Tenth Biennial Report to the Governor and the Legislature. With regard to permissive rehearings, the report states: "The [draft] statute provides ... that the right to judicial review is not lost by a failure to petition for reconsideration. The Council decided that the established policy requiring the exhaustion of administrative remedies is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review exists.... [¶] The

proposals in the field of judicial review are in substantially the form in which they were submitted publicly in a tentative draft. They have received general approval from the agencies and from members of the bar and the Council believes that the enactment of these recommended statutes will ****549** produce a substantial improvement in our present procedure for the judicial review of administrative orders and decisions." (Judicial Council of Cal., 10th Biennial Rep. (1944) Rep. on Administrative Agencies Survey, p. 28.)

> FN3. The Judicial Council was entrusted to "make a thorough study of the subject ... of review of decisions of administrative boards, commissions and officers ... [and] formulate a comprehensive and detailed plan ... [including] drafts of such legislative measures as may be calculated to carry out and effectuate the plan." (Stats.1943, ch. 991, § 2, p. 2904.)

*****709** In enacting the APA, the Legislature concurred with this recommendation. Government Code section 11523 controls judicial review of agency rulings under the APA and provides that "[t]he right to petition shall not be affected by the failure to seek reconsideration before the agency." Of course, section 11523 applies only in proceedings arising under the APA.

Over the next half-century, the *Alexander* rule remained controlling authority but garnered little attention in either case law or legal scholarship. *Alexander* was expressly followed in two early decisions. (*Clark v. State Personnel Board* (1943) 61 Cal.App.2d 800, 144 P.2d 84; *Child v. State Personnel Board* (1950) 97 Cal.App.2d 467, 218 P.2d 52.) While over the decades *Alexander* was cited in decisions several dozen other times, the citation was nearly always a reference to the *Abelleira* principle, i.e., the general proposition that one must exhaust administrative remedies before seeking recourse in the courts.

The specific effect of failing to seek a seemingly permissive rehearing was not at issue in another published case until *Benton v. Board of Supervisors, supra,* 226 Cal.App.3d 1467, 277 Cal.Rptr. 481. In *Benton,* opponents of a California Environmental Quality Act (CEQA) decision by a county board of supervisors did not request reconsideration by the board before seeking a writ of mandate in the superior court. The Court of Appeal rejected the argument the petitioners ***499** had failed to exhaust administrative remedies, concluding that because county ordinances and CEQA guidelines expressly denied the board any authority to reconsider its decision, there was no additional remedy to pursue. (*Id.* at pp. 1474-1475, 277 Cal.Rptr. 481.)

The Court of Appeal went on to bolster its conclusion, stating: "Second, even if we assume arguendo that the board had the authority to reconsider its adoption of the mitigated negative declaration, we are satisfied that the Bentons exhausted their administrative remedies. At one time, the California Supreme Court required an aggrieved person to apply to the administrative body for a rehearing after a final decision had been issued in order to exhaust administrative remedies. (*Alexander v. State Personnel Bd.* (1943) 22 Cal.2d 198, 199-201 [137 P.2d 433]; see 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 309, p. 398.) This holding--criticized by at least one legal scholar as 'extreme'--has been repealed by statute. (Gov.Code, § 11523 [Administrative Procedure Act cases]; see 3 Witkin, Cal. Procedure, *supra,* § 309, p. 398.) Therefore, we are not bound by it. The Bentons complied with the exhaustion requirement when they filed a timely appeal of the commission's decision to the board and argued their position before that body. [Citations.]" (*Benton v. Board of Supervisors, supra,* 226 Cal.App.3d at p. 1475, 277 Cal.Rptr. 481, fn. omitted.)

The Legislature, of course, did not directly overturn the *Alexander* rule by enacting the APA, because the procedural changes it created were limited to APA cases. To directly repudiate the *Alexander* rule, the Legislature would have had to enact a contrary statute of general application, providing that in all cases not otherwise provided for by statute or regulation, the failure to seek reconsideration before an administrative body does not affect the right to judicial review. The *Alexander* rule thus remains the controlling common law of this state, even though the only recent case specifically to discuss that rule opined it is no longer in force.

IV. MERITS OF THE *Alexander* Rule

[3] We have reconsidered the *Alexander* rule and come to the conclusion that it suffers from several basic flaws. First, the *Alexander* rule might easily be overlooked, even by a reasonably alert litigant. At the most basic level, when a party has been given ostensibly permissive statutory authorization to seek reconsideration of a final decision, that he or she is affirmatively *required* to do so in order to obtain recourse to the courts is ****550** not intuitively *****710**

obvious. Even to attorneys, the word "may" ordinarily means just that. It does not mean "must" or "shall."

***500** Likewise, attorneys and litigants familiar with the rudiments of court procedure know that one need not make a request for a new trial prior to filing an appeal of an adverse judgment, nor seek reconsideration of an adverse appellate decision prior to seeking review in this court. Without receiving explicit notification from within the statutory scheme, they are unlikely to anticipate that a different rule will apply in administrative proceedings. This requirement, indeed, may not be apparent even to practitioners with experience in administrative law, since under the APA a rehearing opportunity styled as permissive is actually permissive, and not a mandatory prerequisite to court review. (Gov.Code, § 11523.)

Nor would an attorney familiar with federal law be placed on notice. The relevant section of the federal Administrative Procedure Act, 5 United States Code section 704, provides: "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes [of judicial review] whether or not there has been presented or determined an application ... for any form of reconsideration...." In spite of the citations to federal case law in the *Alexander* majority opinion, this is the common law rule in federal courts and had been for decades before *Alexander* was decided. (See, e.g., *Prendergast v. N.Y. Tel. Co.* (1923) 262 U.S. 43, 48, 43 S.Ct. 466, 67 L.Ed. 853; *Levers v. Anderson* (1945) 326 U.S. 219, 222, 66 S.Ct. 72, 90 L.Ed. 26.) [FN4]

> FN4. Neither federal case relied upon by the *Alexander* majority actually holds that a rehearing must be sought whenever available. In each case, the litigants attempted to raise issues before the courts that had never been raised in the proceeding before the administrative tribunal. (*Vandalia R.R. v. Public Service Comm.* (1916) 242 U.S. 255, 37 S.Ct. 93, 61 L.Ed. 276; *Red River Broadcasting Co. v. Federal C. Commission* (D.C.Cir.1938) 98 F.2d 282.) Neither case stands for anything more than a general exhaustion principle, à la *Abelleira.*

In sum, even an alert legal practitioner could overlook the necessity of seeking rehearing, as a condition to judicial review, until after the deadline to act had passed, and many who petition before administrative bodies do so without the benefit of legal training. In recent years, moreover, even an awareness of the rehearing issue might not have avoided the potential pitfall, given that the only recent Court of Appeal decision (*Benton v. Board of Supervisors, supra,* 226 Cal.App.3d at p. 1475, 277 Cal.Rptr. 481) declares the rule to have been legislatively repealed, and a leading treatise on California procedure, citing that decision, strongly implies the rule is no longer in force. [FN5]

> FN5. Witkin states: "In [*Alexander*], a split court took the extreme position that the exhaustion doctrine included a requirement of application to the administrative body for a *rehearing* of its final determination. [Citation.] This view was later repudiated by statute, both for the Personnel Board (Govt.C.19588) and for agencies under the Administrative Procedure Act (Govt.C.11523)." (3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 309, p. 398, italics in original.) Some specific practice guides are even more emphatic in their view the *Alexander* rule is no longer good law. (See, e.g., 1 Fellmeth & Folsom, Cal. Administrative and Antitrust Law (1992) § 8.04, p. 361 ["Although at one time a litigant was required to seek a rehearing or petition for reconsideration, that requirement is no longer commonly applied." (Fn.omitted.)]; 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 1997) § 23.100, pp. 1015-1016 ["The continuing vitality of the *Alexander* rule ... is questionable."].)

***501** Of course, circumstances can exist where enforcement of a judicially created procedural rule is justifiable even though the rule is neither intuitively expected nor consistent with other procedural schemes. If the *Alexander* rule were necessary to the purposes behind the doctrine of exhaustion of administrative remedies, or at least significantly advanced those purposes, then its usefulness might well outweigh *****711** its drawbacks. This does not appear to be the case.

[4][5] "There are several reasons for the exhaustion of remedies doctrine. 'The basic purpose for the exhaustion doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief.' (*Morton v.*

Superior Court [(1970)] 9 Cal.App.3d 977, 982, 88 Cal.Rptr. 533.) Even where the ****551** administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor 'because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.' (*Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 980 [201 Cal.Rptr. 379].) It can serve as a preliminary administrative sifting process (*Bozaich v. State of California* (1973) 32 Cal.App.3d 688, 698 [108 Cal.Rptr. 392]), unearthing the relevant evidence and providing a record which the court may review. (*Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 476 [131 Cal.Rptr. 90, 551 P.2d 410].)" (*Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 1240-1241, 230 Cal.Rptr. 382.)

In cases such as this, however, the administrative record has been created, the claims have been sifted, the evidence has been unearthed, and the agency has already applied its expertise and made its decision as to whether relief is appropriate. The likelihood that an administrative body will reverse itself when presented only with the same facts and repetitive legal arguments is small. Indeed, no court would do so if presented with such a motion for reconsideration, since such a filing is expressly barred by statute. (Code Civ. Proc., § 1008.)

We also think it unlikely the *Alexander* rule has any substantial effect in reducing the burden on the courts. When the parties are aware of the rule and ***502** comply with it, the administrative body presented with the same facts and arguments is unlikely to reverse its decision. The only likely consequence is delay and expense for both the parties and the administrative agency prior to the commencement of judicial proceedings. Of course, the courts' burden is marginally reduced by the occasional case when a party, unaware of the rule, fails to comply and thus is barred from seeking judicial review, but we believe the striking of potentially meritorious claims solely to clear them from a court's docket should not stand as a policy goal in and of itself.

The primary useful purpose the rule might serve was expressed in *Alexander* itself. Theoretically, the rule "give[s] the [administrative body] an opportunity to correct any mistakes it may have made." (*Alexander, supra,* 22 Cal.2d at p. 200, 137 P.2d 433.) We presume, however, that the decisions of the various agencies of this state are reached, in the overwhelming majority of the proceedings undertaken, only after due consideration of the issues raised and the evidence presented. While occasional mistakes are an unfortunate by-product of all tribunals, judicial or administrative, the fact remains that a petition for reconsideration, raising the same arguments and evidence for a second time, will not likely often sway an administrative body to abandon the conclusions it has reached after full prior consideration of those same points.

We are not alone in our reasoning. After a multiyear consideration and public review process, the California Law Revision Commission recently issued a report recommending a complete overhaul and consolidation of the myriad statutes for judicial review of California agency decisions under one uniform procedural scheme. (Judicial Review of Agency Action (Feb.1997) 27 Cal. Law Revision Com. Rep. (1997) p. 13 (Revision Report).) The commission's proposed legislation provides in pertinent part: "all administrative remedies available within an agency are deemed exhausted ... if no higher level of review is available within the agency, *****712** whether or not a rehearing or other lower level of review is available within the agency, unless a statute or regulation requires a petition for rehearing or other administrative review." (*Id.*, § 1123.320, p. 75.) The comment to this section is clear: "Section 1123.320 restates the existing California rule that a petition for a rehearing or other lower level administrative review is not a prerequisite to judicial review of a decision in an adjudicative proceeding. See former Gov't Code § 11523, Gov't Code § 19588 (State Personnel Board). This overrules any contrary case law implication. *Cf.* Alexander v. State Personnel Bd., 22 Cal.2d 198, 137 P.2d 433 (1943)." (*Id.* at pp. 75-76.)

The Revision Report also contains several background studies by Professor Michael Asimow, who was retained by the commission as a special ***503** consultant for this project. In ****552** discussing this issue, Professor Asimow opines: "Both the existing California APA and other statutes provide that a litigant need not request reconsideration from the agency before pursuing judicial review. However, the common law rule in California may be otherwise [citing *Alexander*]. A request for reconsideration should never be required as a prerequisite to judicial review unless specifically provided by statute to the contrary." (Revision Rep., *supra,* at pp. 274-275, fns. omitted.) We recognize that, to date, the Legislature has not acted on the Law Revision Commission's recommendations; we do not

suggest that the unenacted recommendation reflects the current state of California law. It does reflect, however, the opinion of a learned panel as to the wisdom of and necessity for the *Alexander* rule.

Over 50 years ago, the United States Supreme Court suggested that: "motions for rehearing before the same tribunal that enters an order are under normal circumstances mere formalities which waste the time of litigants and tribunals, tend unnecessarily to prolong the administrative process, and delay or embarrass enforcement of orders which have all the characteristics of finality essential to appealable orders." (*Levers v. Anderson, supra*, 326 U.S. at p. 222, 66 S.Ct. 72; see also Rames, *Exhausting the Administrative Remedies: The Rehearing Bog* (1957) 11 Wyo. L.J. 143, 149-153.) We agree. There is little reason to maintain "an illogical extension of this general rule [of exhaustion of administrative remedies that] require[s] an idle act." (Cal. Administrative Mandamus (Cont.Ed.Bar.1989) § 2.30, p. 52.) Were the issue before us in the first instance, we would have little difficulty concluding that the rule concerning administrative rehearings should be made consistent with judicial procedure, the federal rule, and California's own APA. [FN6]

> FN6. An amicus curiae submission from 74 California cities suggests that reversing the *Alexander* rule would interfere with the uniformity of California exhaustion law and create confusion as to which administrative remedies need be followed and which could be bypassed. The concern is overstated. There is nothing uniform about the current state of exhaustion law with regard to permissive reconsideration. Reversal would merely make California common law consistent with the APA, federal law, and parallel judicial procedure. The effect of such a reversal is limited to reconsideration and has no effect on general principles requiring that each available stage of administrative appeal be exhausted.

V. STARE DECISIS AND LEGISLATIVE INTENT

[6][7][8][9] The issue of whether seemingly permissive reconsideration options in administrative proceedings need be exhausted is not before us for the first time, however, and we do not lightly set aside a 50- year-old precedent of this court. "It is, of course, a fundamental jurisprudential policy that prior ***504** applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, 'is based on the assumption that certainty, predictability and stability in the *****713** law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law.' [Citation.] [¶] It is likewise well established, however, that the foregoing policy is a flexible one which permits this court to reconsider, and ultimately to depart from, our own prior precedent in an appropriate case. [Citation.] As we stated in *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 924 [221 Cal.Rptr. 575, 710 P.2d 375], '[a]lthough the doctrine [of stare decisis] does indeed serve important values, it nevertheless should not shield court-created error from correction.' " (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296, 250 Cal.Rptr. 116, 758 P.2d 58.)

[10][11] The significance of stare decisis is highlighted when legislative reliance is potentially implicated. (See, e.g., *People v. Latimer* (1993) 5 Cal.4th 1203, 1213-1214, 23 Cal.Rptr.2d 144, 858 P.2d 611 (*Latimer*).) Certainly, "[*s*]tare decisis has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." ****553** (*Hilton v. South Carolina Public Railways Comm'n* (1991) 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560.)

In *Latimer, supra*, 5 Cal.4th 1203, 23 Cal.Rptr.2d 144, 858 P.2d 611, we considered the ongoing vitality of a 30-year-old precedent of this court interpreting Penal Code section 654 as prohibiting multiple punishments for multiple criminal acts when those acts had been committed with a single intent and objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, 9 Cal.Rptr. 607, 357 P.2d 839 (*Neal*).) Although the *Neal* rule had been the subject of criticism, and we acknowledged we might now decide the matter differently had it been presented to us as a matter of first impression (*Latimer, supra*, 5 Cal.4th at pp. 1211-1212, 23 Cal.Rptr.2d 144, 858 P.2d 611), we concluded we were not free to do so because of the collateral consequences such a reversal might have on the entire complicated determinate sentencing structure the Legislature had enacted in the intervening years. "At this time, it is impossible to determine whether, or how, statutory law might have developed differently had this court's

interpretation of section 654 been different. For example, the limitations the *Neal* rule placed on consecutive sentencing may have affected legislative decisions regarding the length of sentences for individual crimes or the development of sentence enhancements. [¶] ... [¶] ... What would the Legislature have intended if it had ***505** known of the new rule? On a more general front, what other statutes and legislative decisions may have been influenced by the *Neal* rule, and in what ways? These are questions the Legislature, not this court, is best equipped to answer." (*Id.* at pp. 1215-1216, 23 Cal.Rptr.2d 144, 858 P.2d 611.)

[12] Of course, principles of stare decisis do not preclude us from ever revisiting our older decisions. Indeed, in the same year we decided *Latimer* we overruled a different sentencing precedent in *People v. King* (1993) 5 Cal.4th 59, 19 Cal.Rptr.2d 233, 851 P.2d 27 (*King*). The primary difference between the cases was the extent to which a reversal of precedent would cast uncertainty on the appropriate interpretation of the other statutes and case law that make up California's criminal sentencing structure. As we explained in *Latimer*, the sentencing precedent at issue in *King* "was a specific, narrow ruling that could be overruled without affecting a complete sentencing scheme. The [rule at issue in *Latimer*], by contrast, is far more pervasive; it has influenced so much subsequent legislation that stare decisis mandates adherence to it. It can effectively be overruled only in a comprehensive fashion, which is beyond the ability of this court. The remedy for any inadequacies in the *****714** current law must be left to the Legislature." (*Latimer, supra*, 5 Cal.4th at p. 1216, 23 Cal.Rptr.2d 144, 858 P.2d 611.)

We do not perceive legislative reliance to be a substantial obstacle in this case. Like the precedent at issue in *King*, *Alexander* sets forth a narrow rule of limited applicability. Certainly, no reason appears to believe the rule is a vital underpinning of the entire administrative law structure of California. Unlike the precedent at issue in *Latimer*, little hard evidence suggests the Legislature has affirmatively taken the *Alexander* rule into account in enacting subsequent legislation.

Unlike the rules at issue in both *King* and *Latimer*, the *Alexander* rule is not a matter of statutory interpretation, as it does not hinge on the meaning of specific words as used in a particular statute. It is a rule of procedure that comes into play whenever the Legislature offers parties the option to seek reconsideration of a final administrative decision without specifying in the relevant statute the consequences, if any, of failing to do so. Thus, the Legislature has not had an opportunity affirmatively to acquiesce in the *Alexander* rule by reenacting or reaffirming exact statutory language. (See, e.g., *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 219, 246 Cal.Rptr. 733, 753 P.2d 689; *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734, 180 Cal.Rptr. 496, 640 P.2d 115.)

[13] Likewise, as noted previously, in order directly to repudiate the *Alexander* rule, the Legislature would have been required to enact a contrary statute of ***506** general application, providing that in all cases not otherwise provided for by statute or regulation, the ****554** failure to seek reconsideration before an administrative body does not, standing alone, affect the right to judicial review. The Legislature has not enacted such a statute, but that it has not chosen to do so is not necessarily dispositive of its intentions. "The Legislature's failure to act may indicate many things other than approval of a judicial construction of a statute: the ' " 'sheer pressure of other and more important business,' " ' ' " 'political considerations,' " ' or a ' " 'tendency to trust to the courts to correct their own errors....' " ' " (*County of Los Angeles v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 391, 404, 179 Cal.Rptr. 214, 637 P.2d 681; see also *King, supra*, 5 Cal.4th at p. 77, 19 Cal.Rptr.2d 233, 851 P.2d 27; *Latimer, supra*, 5 Cal.4th at p. 1213, 23 Cal.Rptr.2d 144, 858 P.2d 611; *People v. Escobar* (1992) 3 Cal.4th 740, 750-751, 12 Cal.Rptr.2d 586, 837 P.2d 1100.)

No explicit evidence of legislative acquiescence in the *Alexander* rule appears. Neither are there any indications of a legislative view as to the application of the *Alexander* rule specifically to the LAFCO statutory scheme. Respondents argue the Legislature must have enacted Government Code section 56857, subdivision (a) with the implicit understanding the *Alexander* rule would apply and with the affirmative intention that it do so. As we have noted, nothing in the language of the statute compels this conclusion or provides affirmative evidence of legislative approval or disapproval, or even awareness, of the *Alexander* rule.

[14] Respondents alternatively argue that the Legislature invested the LAFCO reconsideration remedy with special significance by providing that, if a request for amendment or reconsideration is filed, the annexation process is suspended until the LAFCO has acted upon the request. (Gov.Code, § 56857, subd. (c).) From this, they extrapolate that the

Legislature must consider reconsideration to be especially meaningful in the LAFCO context and, thus, that the Legislature must affirmatively believe requests for reconsideration are a mandatory remedy that must always be exhausted prior to judicial review. We do not agree. These sections merely demonstrate the Legislature considers such requests to have significance when they are actually made. They cast no light on ***715** whether the Legislature wants parties to file pro forma requests for reconsideration.

We have not been provided with, nor has our research disclosed, any legislative history demonstrating that, in enacting Government Code section 56857, subdivision (a), the Legislature affirmatively considered the significance of providing a permissive reconsideration remedy to a party who has already obtained a final decision. In lieu of direct indications of legislative ***507** intent, respondents argue the Legislature's awareness and approval of the general applicability of the *Alexander* rule may indirectly be demonstrated by the existence of other statutes containing reconsideration options. The Legislature has enacted several statutes that provide for reconsideration before the administrative body, but specify that the right to seek judicial review is *not* affected by the failure to seek reconsideration. Respondents have identified several statutes worded in this manner, in addition to the APA itself. (Wat.Code, § 1126, subd. (b); Health & Saf.Code, § 40864, subd. (a); Gov.Code, § 19588; Stats.1989, ch. 1392, § 421, pp. 6023-6024, Deering's Wat.--Uncod. Acts (1999 Supp.) Act 2793, p. 162; Stats.1989, ch. 844, § 504, p. 2777, Deering's Wat.--Uncod. Acts (1999 Supp.) Act 4833, p. 26.) Because these statutes postdate and thus supersede the *Alexander* rule where applicable, their enactment permits an inference of ongoing legislative awareness of the *Alexander* rule. Reversing course at this date, respondents maintain, would render the relevant language in these provisions surplusage.

As petitioners point out, however, at least one statute provides the opposite. Labor Code section 5901 was amended in 1951 to provide in pertinent part: "No cause of action arising out of any final order, decision or award made and filed by a [workers' compensation] commissioner or a referee shall accrue in any court to any person until and unless ... such person files a petition for reconsideration, and such reconsideration is granted or denied." (Stats.1951, ch. 778, § 14, pp. 2268-2269.) Among other things, ****555** the 1951 amendment replaced the word "rehearing" in the statute with the word "reconsideration." (See Historical Note, 45 West's Ann. Lab.Code (1989 ed.) foll. § 5901, p. 177.) Thus, the Legislature chose to fine-tune language in a statute providing that a workers' compensation claimant must request reconsideration of a final decision prior to recourse to the courts, even though the entire provision would be surplusage were we to assume the Legislature's awareness of the rule of general application provided by *Alexander*.

Further ambiguity may be found in other statutes. Health and Safety Code section 121270, the AIDS Vaccine Victims Compensation Fund statute, provides in pertinent part: "(h) ... Upon the request by the applicant within 30 days of delivery or mailing [of the written decision], the board may reconsider its decision. [¶] (i) Judicial review of a decision shall be under Section 1094.5 of the Code of Civil Procedure, and the court shall exercise its independent judgment. A petition for review shall be filed as follows: [¶] (1) If no request for reconsideration is made, within 30 days of personal delivery or mailing of the board's decision on the application. [¶] (2) If a ***508** timely request for reconsideration is filed and rejected by the board, within 30 days of ... the notice of rejection. [¶] (3) If a timely request for reconsideration is filed and granted by the board, ... [within 30 days of the final decision]." Although the statute does not expressly state that a party who fails to seek reconsideration may seek judicial review, by providing for different time limitations depending on whether reconsideration was sought, the statutory wording arguably implies that in enacting the statute the Legislature was operating under the assumption that failure to seek reconsideration of a final administrative decision is not ordinarily a bar to further ***716** judicial review. Any such inference, however, is weak.

In sum, all the inferences the parties would have us draw are insubstantial and do not provide us with a sufficient basis to extrapolate legislative approval of the *Alexander* rule. The most one can say is that at times the Legislature has had a specific intention regarding the significance of reconsideration in an administrative scheme and has chosen to craft a statute so as to accomplish its intentions.

We ultimately return to the sole reliable indication of the Legislature's view of the need for the *Alexander* rule. In enacting the APA, the Legislature was aware it was creating a general statutory framework that would be applied by myriad agencies under varying circumstances, not a specific scheme applicable to only one type of administrative hearing.

Despite this anticipation of broad applicability, the Legislature determined the right to judicial review under the APA shall not be affected by failure to seek reconsideration before the agency in question, because the "policy requiring the exhaustion of administrative remedies is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review exists." (Judicial Council of Cal., 10th Biennial Rep., *supra,* at p. 28.)

"[The Tenth Biennial Report] is a most valuable aid in ascertaining the meaning of the statute. While it is true that what we are interested in is the legislative intent as disclosed by the language of the section under consideration, the council drafted this language at the request of the Legislature, and in this respect was a special legislative committee. As part of its special report containing the proposed legislation it told the Legislature what it intended to provide by the language used. In the absence of compelling language in the statute to the contrary, it will be assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report." (*Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 397, 184 P.2d 323; accord, *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 817, 140 Cal.Rptr. 442, 567 P.2d 1162.)

***509** Neither the APA nor any other statute has any compelling language to the contrary. As best we can surmise, the considered public policy judgment of the Legislature is that the exhaustion of administrative remedies doctrine is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review arises. This judgment is consistent ****556** with our own conclusion the *Alexander* rule is neither necessary nor useful.

[15][16][17] Respondents argue that if we determine to overrule the *Alexander* rule, the decision should have only prospective effect. We do not agree. A decision of this court overruling one of our prior decisions ordinarily applies retroactively. (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978, 258 Cal.Rptr. 592, 772 P.2d 1059; *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 151, 181 Cal.Rptr. 784, 642 P.2d 1305.) Admittedly, "we have long recognized the potential for allowing narrow exceptions to the general rule of retroactivity when considerations of fairness and public policy are so compelling in a particular case that, on balance, they outweigh the considerations that underlie the basic rule. A court may decline to follow the standard rule when retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law. In other words, courts have looked to the 'hardships' imposed on parties by full retroactivity, permitting an exception only when the circumstances of a case draw it apart from the usual run of cases." (*Newman, supra,* at p. 983, 258 Cal.Rptr. 592, 772 P.2d 1059.)

[18] We do not perceive that retroactive application of our decision will create ****717** any unusual hardships. *Alexander* set forth a rule of very limited application. That the general administration of justice will be significantly affected by its abrogation or many pending actions will be affected is unlikely. No issue of substantial detrimental reliance is present here; no one has acquired a vested right or entered into a contract based on the existence of the *Alexander* rule. (E.g., *Peterson v. Superior Court, supra,* 31 Cal.3d at p. 152, 181 Cal.Rptr. 784, 642 P.2d 1305.) Finally, all things being equal, we deem it preferable to apply our decisions in such a manner as to preserve, rather than foreclose, a litigant's day in court on the merits of his or her action. (See, e.g., *Newman v. Emerson Radio Corp., supra,* 48 Cal.3d at p. 990, 258 Cal.Rptr. 592, 772 P.2d 1059; *Moradi-Shalal v. Fireman's Fund Ins. Companies, supra,* 46 Cal.3d at pp. 304-305, 250 Cal.Rptr. 116, 758 P.2d 58.)

Respondents argue that to permit petitioners to receive the benefit of our decision would be inequitable, since they were presumably aware of the *Alexander* rule and made a voluntary decision to ignore it. Respondents ***510** infer this awareness solely from petitioner Parfrey's initial request for reconsideration of SJLAFCO's approval of the annexation of the development property, which he later withdrew. In reality, the filing and subsequent withdrawal of a reconsideration request are equally consistent with an understanding that reconsideration is merely permissive as with a belief it is mandatory. Indeed, to assume petitioners consciously chose to expose their action to dismissal on purely procedural grounds is difficult. Moreover, as we have discussed in detail above, although *Alexander* was decided over a half-century ago, the rule of the case has remained relatively obscure since that time, and that a litigant would be uncertain of its vitality today is not at all unlikely. The filing and withdrawal of a request for reconsideration appears to reflect only a judgment that perfecting the request would not be worthwhile.

We hereby overrule *Alexander, supra,* 22 Cal.2d 198, 137 P.2d 433, and hold that, subject to limitations imposed by statute, the right to petition for judicial review of a final decision of an administrative agency is not necessarily affected by the party's failure to file a request for reconsideration or rehearing before that agency.

[19][20][21] We emphasize this conclusion does not mean the failure to request reconsideration or rehearing may never serve as a bar to judicial review. Such a petition remains necessary, for example, to introduce evidence or legal arguments before the administrative body that were not brought to its attention as part of the original decisionmaking process. (See, e.g., 2 Davis & Pierce, Administrative Law Treatise (3d ed.1994) § 15.8, p. 341.) Our reasoning here is not addressed to new evidence, changed circumstances, fresh legal arguments, filings by ****557** newcomers to the proceedings and the like. Likewise, a rehearing petition is necessary to call to the agency's attention errors or omissions of fact or law in the administrative decision itself that were not previously addressed in the briefing, in order to give the agency the opportunity to correct its own mistakes before those errors or omissions are presented to a court. The general exhaustion rule remains valid: Administrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum. Our decision is limited to the narrow situation where one would be required, after a final decision by an agency, to raise for a second time the same evidence and legal arguments one has previously raised solely to exhaust administrative remedies under *Alexander.*

*****718 *511** The judgment of the Court of Appeal is reversed, and the cause is remanded for further proceedings in accordance with this decision.

GEORGE, C.J., MOSK, J., KENNARD, J., BAXTER, J., CHIN, J., and BROWN, J., concur.

21 Cal.4th 489, 981 P.2d 543, 87 Cal.Rptr.2d 702, 99 Cal. Daily Op. Serv. 6719, 1999 Daily Journal D.A.R. 8553

Briefs and Other Related Documents (Back to top)

• 1998 WL 760380 (Appellate Brief) APPELLANTS' OPENING BRIEF ON THE MERITS (Oct. 23, 1998)

• 1998 WL 34188068 (Appellate Petition, Motion and Filing) Petition for Review (Jul. 29, 1998)Original Image of this Document with Appendix (PDF)

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